



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 065 988 610

HARVARD LAW LIBRARY

Digitized by Google



OF

CASES 29

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

By LUTHER S. CUSHING.

VOLUME VII.

BOSTON:
LITTLE, BROWN AND COMPANY.

1858.

KFM
2445
.A2
v. 61
C. 4

Entered according to Act of Congress, in the year 1853, by
LITTLE, BROWN AND COMPANY,
In the Clerk's Office of the District Court of the District of Massachusetts.

JUDGES
OF THE
SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.	
HON. CHARLES A. DEWEY,	} JUSTICES.
HON. THERON METCALF,	
HON. RICHARD FLETCHER,	
HON. GEORGE T. BIGELOW,	

ATTORNEY-GENERAL,
HON. JOHN H. CLIFFORD.

39151

TABLE

OF THE CASES REPORTED.

Abbott (<i>Dixie v.</i>)	610	Bottom <i>v.</i> Clarke	487
Adam <i>v.</i> Briggs Iron Co.	361	Bowman (<i>Ridgway v.</i>)	268
Adams <i>v.</i> Brown	220	Braggiotti (<i>Reggio v.</i>)	166
Alexander <i>v.</i> Pitts	503	Brainard <i>v.</i> Connecticut River	
Alger (<i>Commonwealth v.</i>)	53	Railroad	506
Babcock (<i>Cook v.</i>)	526	Breed (<i>May v.</i>)	15
Bacon <i>v.</i> Charlton	581	— (<i>Norris v.</i>)	15
— <i>v.</i> Robinson	579	Brewer <i>v.</i> Dyer	837
Baker <i>v.</i> Moffat	259	Briggs Iron Co. (<i>Adam v.</i>)	361
Balch <i>v.</i> Shaw	282	Brown (<i>Adams v.</i>)	220
Baldwin <i>v.</i> Standish	207	— (<i>Pike v.</i>)	133
Ball <i>v.</i> Newton	599	Bruce <i>v.</i> Keogh	536
Barnes <i>v.</i> Harris	576	Bryant <i>v.</i> Eastman	111
Barrett <i>v.</i> Union M. F. Ins.		Burke <i>v.</i> Miller	547
Co.	175	Burt (<i>Decreet v.</i>)	551
Bartol <i>v.</i> Stanwood	115	Campbell <i>v.</i> Race	408
Bates <i>v.</i> Stone	341	Capen (<i>City of Boston v.</i>)	116
Baury (<i>Wight v.</i>)	105	Chamberlin (<i>Weston v.</i>)	404
Becket (<i>Shaw v.</i>)	442	Charlton (<i>Bacon v.</i>)	581
Belcher <i>v.</i> Smith	482	Church <i>v.</i> Savage	440
Belchertown, School District		Clark <i>v.</i> Hatch	455
in, <i>v.</i> Randall	478	— (<i>Morrison v.</i>)	213
Bennett (<i>Locke v.</i>)	445	— <i>v.</i> Tainter	567
Benson (<i>Eldridge v.</i>)	483	Clarke (<i>Bottom v.</i>)	487
— <i>v.</i> Monroe	125	Coffin <i>v.</i> Field	355
Berkshire, County Commis-		Cole (<i>Stevens v.</i>)	467
sioners of, (<i>Monterey v.</i>)	394	Coleman <i>v.</i> Easton	355
Berkshire Woollen Co. <i>v.</i>		— <i>v.</i> Field	355
Proctor	417	Commonwealth <i>v.</i> Alger	53
Billings (<i>Marsh v.</i>)	322	— <i>v.</i> Henry	512
Boston, City of, <i>v.</i> Capen	116	— <i>v.</i> Kellogg	473
— (<i>Downer v.</i>)	277	— <i>v.</i> Shedd	514
— (<i>Howe v.</i>)	273	Connecticut River Railroad	
— (<i>Smith v.</i>)	254	(<i>Brainard v.</i>)	506

Cook v. Babcock	526	Hatstat v. Packard	245
Cox (Hodskin v.)	471	Hayward (Shaw v.)	170
Crocker v. Stone	341	Hemenway (Tainter v.)	573
Decreet v. Burt	551	Henry (Commonwealth v.)	512
Dixie v. Abbott	610	Hodskin v. Cox	471
Downer v. City of Boston	277	Holbrook v. Jackson	136
Dunbar v. Tainter	574	Hooper (Massachusetts Iron Co. v.)	183
Dwight v. County Commissioners of Hampden	533	Houghton (Mann v.)	592
— (Western Bank v.)	539	Howard (Robinson v.)	611, 2
Dyer (Brewer v.)	337	— & trustee (Robinson v.)	257
Eastman (Bryant v.)	111	Howe v. City of Boston	273
Easton (Coleman v.)	355	— v. Long Wharf	195
— (Folger v.)	355	Hubbard v. Knous	556
— (Gardner v.)	355	— (Stone v.)	595
Edwards (Tremain v.)	414	Huntington v. Knox	371
Eldridge v. Benson	483	Isley v. Merriam	242
Ellis v. Page	161	Jackson (Holbrook v.)	136
Elm (Prescott v.)	346	Jennings v. Fisher	239
Emerson (Fuller v.)	203	Johnson v. Stevens	431
Estes (Southwick v.)	385	Johnston (Park v.)	265
Fay v. Noble	188	Kellenberger v. Sturtevant	465
Felton v. Wadsworth	587	Kellogg (Commonwealth v.)	473
Field (Coffin v.)	355	— (Pettis v.)	456
— (Coleman v.)	355	— v. Smith	375
— (Folger v.)	355	Kendall (Sheldon v.)	217
Fifield (Knight v.)	263	Keogh (Bruce v.)	536
Fisher (Jennings v.)	239	King v. State M. F. Ins. Co.	1
— (Peck v.)	386	Knight v. Fifield	263
Fitzgerald (Strickland v.)	530	Knous (Hubbard v.)	556
Folger v. Easton	355	Knox (Huntington v.)	371
— v. Field	355	Locke v. Bennett	445
— v. Vincent	355	Long Wharf (Gould v.)	195
Fox v. Harding	516	— (Howe v.)	195
Frederick (Maynard v.)	247	— (Merrill v.)	195
Fuller v. Emerson	203	— (Saltonstall v.)	195
— (Quinn v.)	224	Lovell (New England Glass Co. v.)	319
Gardner v. Easton	355	Maine (Pray v.)	253
Gould v. Long Wharf	195	Mann v. Houghton	592
Hampden, County Commissioners of, (Dwight v.)	533	Marsh v. Billings	322
Harding (Fox v.)	516	Massachusetts Iron Co. v. Hooper	183
Harmon (Stillis v.)	406	May v. Breed	15
Harrington v. Rice	209	Maynard v. Frederick	247
Harris (Barnes v.)	576	Merriam (Isley v.)	242
Hatch (Clark v.)	455		

Merrill v. Long Wharf . . .	195	Ridgway v. Bowman . . .	268
Miller (Burke v.) . . .	547	Robinson (Bacon v.) . . .	579
— (Sleeper v.) . . .	594, n	— v. Howard . . .	611, n
Mills (Trask v.) . . .	552	— v. — & trustee	257
— (Western Bank v.) . . .	589	Russell (Pratt v.) . . .	462
Mitchell v. Pease . . .	850		
— v. Stetson . . .	435	St. Luke's Church v. Slack .	226
Moffat (Baker v.) . . .	259	Saltonstall v. Long Wharf .	195
Monroe (Benson v.) . . .	125	— (Woodman v.) . . .	181
Monterey v. County Commis-		Saunders (Woodman v.) . . .	181
sioners of Berkshire . . .	394	Savage (Church v.) . . .	440
Morrison v. Clark . . .	213	Sawyer v. Northfield . . .	490
Murray v. Shearer . . .	333	Scott (Mussey v.) . . .	215
Mussey v. Scott . . .	215	Shaw (Balch v.) . . .	282
		— v. Becket . . .	442
Nelson v. Thompson . . .	502	— v. Hayward . . .	170
New England Glass Co. v.		— (Walbridge v.) . . .	560
Lovell . . .	319	Shearer (Murray v.) . . .	333
Newton (Ball v.) . . .	599	Shedd (Commonwealth v.) .	514
Noble (Fay v.) . . .	188	Sheldon v. Kendall . . .	217
Norris v. Breed . . .	15	Sims's Case . . .	285
Northfield (Sawyer v.) . . .	490	Slack (St. Luke's Church v.)	226
Norton v. Palmer . . .	523	Sleeper v. Miller . . .	594, n
		Smith (Belcher v.) . . .	482
Packard (Hatstat v.) . . .	245	— v. City of Boston . . .	254
Packer (Stetson v.) . . .	562	— (Kellogg v.) . . .	375
Page (Ellis v.) . . .	161	— (Southworth v.) . . .	391
Palmer (Norton v.) . . .	523	— v. Wendell . . .	498
Park v. Johnston . . .	265	Southwick v. Estes . . .	385
Pease (Mitchell v.) . . .	350	Southworth v. Smith . . .	391
Peck v. Fisher . . .	386	Standish (Baldwin v.) . . .	207
Pettis v. Kellogg . . .	456	Stanwood (Bartol v.) . . .	115
Pike v. Brown . . .	133	State M. F. Ins. Co. (King v.)	1
Pitts (Alexander v.) . . .	503	Stetson (Mitchell v.) . . .	435
Pratt v. Rice . . .	209	— v. Packer . . .	562
— v. Russell . . .	462	Stevens v. Cole . . .	467
Pray v. Maine . . .	253	— (Johnson v.) . . .	431
Prescott v. Elm . . .	346	Stills v. Harmon . . .	406
Proctor (Berkshire Woollen		Stone (Bates v.) . . .	341
Co. v.) . . .	417	— (Crocker v.) . . .	341
		— v. Hubbard . . .	595
Quinn v. Fuller . . .	224	Strickland v. Fitzgerald . .	530
		Sturtevant (Kellenberger v.)	465
Race (Campbell v.) . . .	408		
Randall (School District in		Tainter (Clark v.) . . .	567
Belchertown v.) . . .	478	— (Dunbar v.) . . .	574
Ranzehausen (Woodworth v.)	430	— v. Hemenway . . .	573
Raymond v. Raymond . . .	605	Thompson (Nelson v.) . . .	502
Reggio v. Braggiotti . . .	166	Trask v. Mills . . .	552
Rice (Harrington v.) . . .	209	Tremain v. Edwards . . .	414
— (Pratt v.) . . .	209		

Union M. F. Ins. Co. (Barrett v.)	175	Weston v. Chamberlin	404
Vincent (Folger v.)	355	White v. Winnisimmet Co.	154
Wadsworth (Felton v.)	587	Wight v. Baury	105
Walbridge v. Shaw.	560	Winnisimmet Co. (White v.)	155
Walker (Webb v.)	46	Woodman v. Saltonstall	181
Webb v. Walker.	46	_____ v. Saunders	181
Wendell (Smith v.)	498	Woodworth v. Ranzehausen	430
Western Bank v. Dwight.	539	Worcester, City of, (Worcester M. F. Ins. Co. v.)	600
_____ v. Mills	539	Worcester M. F. Ins. Co. v. City of Worcester.	600

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET,
MARCH TERM 1851, AT BOSTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF, } JUSTICES.
HON. RICHARD FLETCHER,
HON. GEORGE T. BIGELOW, }

EDWARD KING *vs.* THE STATE MUTUAL FIRE INSURANCE
COMPANY.

A mortgagee, who, at his own expense, insures his interest in the property mortgaged, against loss by fire, without particularly describing the nature of his interest, is entitled, in case of a loss by fire before payment of the mortgage debt, to recover the amount of the loss of the insurers to his own use, without first assigning his mortgage, or any part thereof, to them.

This was an action of assumpsit upon a policy of insurance, and was submitted to the court of common pleas, and, on appeal, to this court, upon the following statement of facts :

"It is agreed that the defendants insured the plaintiff, in

King v. The State Mutual Fire Insurance Company.

the sum of \$300, on his interest in a certain barn, by the policy declared upon in this action, (a copy of which policy is hereunto annexed); that the building so insured was destroyed by fire, as in the plaintiff's declaration alleged; that the defendants had due notice thereof; and that the plaintiff is entitled to recover the amount insured by the terms of the policy, with the interest thereon, unless the court shall be of opinion that the plaintiff is not entitled to maintain this action. It is admitted, that the plaintiff's interest in the premises insured was that of mortgagee of one John Murphy, as expressed in a certain deed of mortgage, dated the 1st of April, 1845, a copy of which is hereto annexed. After notice of the loss, and previous to the commencement of this action, the defendants informed the plaintiff that they were ready, and offered, to pay him, if he would assign his mortgage interest to the same amount. But the plaintiff declined to assign his mortgage; and the defendants refused to pay the loss, unless such assignment should be made by the plaintiff."

The material part of the policy, which was dated the 1st of January, 1847, was as follows :

"This policy of insurance witnesseth, That, whereas Edward King, of Dorchester, in the county of Norfolk, a member of the State Mutual Fire Insurance company, has, agreeably to the by-laws of said company, (hereunto annexed,) paid the sum of three dollars and seventy-five cents, as premium, and the further sum of three dollars and seventy-five cents, as deposit; and also bound and obliged himself, his heirs, executors, and administrators, to pay all such sum or sums as may be assessed by the president and directors of said company, pursuant to the said by-laws, but not in any event to exceed the sum of fifteen dollars: In consideration of the premises, the said King, his heirs, executors, and administrators, are hereby insured against loss or damage by fire, under the conditions and limitations expressed in the said by-laws, and in this policy, for one year, from the first day of January, at noon, until the first day of January, which will be in the year one thousand eight hundred and forty-eight, at noon, the sum of three hundred dollars, on his interest in a two-story wooden barn, on Mill street, situated in Dorchester, in the county of Norfolk, occupied as a stable, by John Murphy; being not more than the actual value of said property, as appears by the proposal of the said insured, lodged with the secretary of this company. This company hereby express their intention to rely upon a lien upon the property hereby insured, to secure the payment of the assessments that may be made according to the by-laws and the act of incorporation."

By the mortgage referred to, John Murphy conveyed to the plaintiff the land on which the barn in question stood, with

King v. The State Mutual Fire Insurance Company.

all the buildings thereon, to secure the payment of a promissory note for the sum of \$400.

The case was argued at November term, 1849.

J. A. Andrew, for the plaintiff.

O. S. Keith, for the defendants, cited *Sadlers' Company v. Babcock*, 2 Atk. 554, 556; *Lynch v. Dalzell*, 4 Bro. P. C. (Toml. ed.) 431, 435; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 503; 3 Kent, (5th ed.) 371; *Howland v. Leach*, 11 Pick. 151; *Couch v. Ingersoll*, 2 Pick. 292; *Egbert v. Chew*, 2 Green, N. J. 446; *Green v. Reynolds*, 2 Johns. 207.

The opinion was delivered at March term, 1850.

SHAW, C. J. This case comes before the court on a statement of facts. The statement is not very full and exact. We understand, from the statement and from the policy, which is made part of it, that the plaintiff made the insurance in his own name and for his own benefit, not describing his interest as that of a mortgagee, and paid the premium out of his own funds. The insurance was for \$300, on his interest in a two-story wooden barn. That interest, in fact, as it appears in the statement of facts and the mortgage deed produced, was that of a mortgagee under a deed previously made to him, by one Murphy, conditioned for the payment of \$400, which debt was outstanding and unpaid at the time of making the policy, the fire, and the demand of payment. The defendants admit the loss by fire, within the time, and admit their liability, unless they have a right, as a preliminary condition to such payment, to demand an assignment of the plaintiff's mortgage interest, as set forth in the statement of facts, or such proportion thereof, as the amount so to be paid by them would bear to the whole mortgage debt. The plaintiff declined making such assignment, and brought this action to recover a total loss.

The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *prima facie*, a good right to recover; and having the same insurable interest at the time of the loss

King v. The State Mutual Fire Insurance Company.

which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that, if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all; and, therefore, that they have no right to demand the partial transfer of the mortgage debt, by them required, as a condition to their liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the question having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought it best to consider the other question now.

We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer who has thus paid the loss, or money paid to his use.

The contract of insurance with the mortgagee, is not an insurance of the debt or of the payment of the debt; that would be an insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the non-payment of the debt, or saved by its payment.

It is not, strictly speaking, an insurance of the property, in the sense of a liability for the loss of the property by fire, to any one who may be the owner. It is rather a personal contract with the person having a proprietary interest in it, that the property shall sustain no loss by fire within the time expressed in the policy. It is a personal contract, which does not pass to an assignee of the property. *Lynch v. Dalzell*, 3 Bro.

P. C. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. A mortgagee has a proprietary interest, a title as owner, in the mortgaged property, not indeed absolute, but defeasible; still, it is a proprietary interest in that property, and the insurer guarantees to him, that the subject in which he has such interest shall not be destroyed or diminished by the peril insured against.

There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor; but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he cannot, it seems, *a fortiori*, that the insurer cannot claim to charge his loss upon the mortgagor, which he would do, if he were entitled to an assignment of the mortgage debt, either in full or *pro tanto*.

The better to understand the precise case under consideration, it may be well to distinguish it from some, which may seem like it, but depend on other principles. *

If the mortgage debt is paid, and the mortgage discharged *before* the loss by fire, it may well be held, that the mortgagee, the assured, cannot recover; not merely because the debt is paid, but because the mortgage is thereby redeemed, and re-vested in the mortgagor; and the proprietary interest of the assured in the property insured, in respect to which alone he had any insurable interest, is determined. And it is a fixed rule of law, that, to make a policy valid, and enable the assured to recover a loss, he must have an interest in the subject, when the contract is made, and when the loss occurs. He must have such an interest when the contract is made, otherwise it is a wager policy, and void; and when the fire occurs, otherwise he sustains no loss by any damage done by the fire to the thing insured, and he has no claim on the contract of indemnity. So, if an owner insure his house, which is burnt within the time limited; if he has sold his house in the mean time, he has no legal claim to recover.

Another case, quite distinguishable, is, where the mortgagor causes insurance to be made on the mortgaged premises, pay-

able to the mortgagee in case of loss. In that case, it is the mortgagor's interest in the subject which is insured, with an irrevocable power of attorney, in legal effect, an assignment, to the mortgagee, as additional collateral security, to receive the avails of the loss, if one happens. In such case, it is very clear that, in case of loss, the insurers must pay the whole amount of the loss, without regard to the fact, that the debt has or has not been paid. If the mortgage debt has not been paid, the money received will go to pay it *pro tanto*, and thus enure to the benefit of the mortgagor, by leaving so much less of his debt for him to pay. If the mortgage debt has been paid, then the loss, when received by the mortgagee, is received from a fund placed in his hands for a special purpose, which has been accomplished; it is the proceeds of an insurance of the interest of the mortgagor, by a contract with him, on a consideration made by him, and assigned to the mortgagee; and of course he receives it to the use of the mortgagor, and must account to him for it.

There is another case not uncommon in practice, where it is agreed at the time of the making of the mortgage, that the mortgagee may cause the property to be insured at the expense of the mortgagor, and that the premium shall be added to the principal and interest, as the debt to be paid on redemption. This is a valid contract; it is not obnoxious to the charge of usury; for, though the sum thus paid enures incidentally to the benefit of the mortgagee, it goes ultimately to the mortgagor's benefit. Then, if a loss occurs before the debt is paid, the sum payable to the mortgagee is the proceeds of a security furnished by the mortgagor, and then, by a general rule of law, applicable to the proceeds of all collateral security furnished by a debtor to his creditor, it goes in reduction of the debt. It is, in effect, a security furnished by the mortgagor; the money received under it is his money, and extinguishes his debt in the same manner as if paid by him.

In all these cases, the mortgagor pays the premium; the amount of insurance is a sum placed in the hands of the mortgagee, at the expense of the mortgagor, and as further collateral security for the debt, and of course the mortgagee is

trustee for the mortgagor, first, to apply the proceeds of that, as of all other collateral securities, to the payment of his debt; but if the debt has been paid, or there is an overplus, he is trustee for the mortgagor. But this furnishes no defence to the insurer. The mortgagee had a title, a qualified title, to the whole mortgaged property; had a right to insure the whole insurable value in his own name; and whether, having recovered the whole, he has a right to retain it to his own use, or is bound to account for it to the mortgagor, it is wholly immaterial to the insurer. It depends on the contract or the relations subsisting between the mortgagor and mortgagee, with which the insurer has no concern.

So it was held in a New York case, that a commission merchant, who had made advances or incurred expenses on goods consigned to him for sale, might insure the whole and recover the whole in his own name; and that it was no defence for the insurer, that the assured was not absolute owner, or might be liable to account to his principal. *De Forest v. Fulton Ins. Co.* 1 Hall, 84.

But it is then intimated that the mortgagee is trustee for the mortgagor; and that, on the ground of this fiduciary relation, what he receives in that character he must account for. But in truth he is not such trustee. Nothing (an eminent judge has said) is so likely to mislead as a simile. In some very limited respects, a mortgagee is a trustee; as when he has entered, and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee. This point has arisen in many cases; but a recent one is direct to the point, and decisive. *Clarke v. Sibley*, 13 Met. 210. *Wilde, J.*, in giving the opinion of the court, cites the case of *Cholmondeley v. Clinton*, 2 Jac. & Walk. 183.

If this is true in England, where the rights of the mortgagee, after condition broken, are purely equitable, and such as are administered by a court of equity; much more in Massachusetts, where the right to redeem, after condition broken, is ascertained and regulated by law, as effectually as the right of the mortgagee to hold for the security of the debt.

Besides; if the fiduciary relation subsisted, and the mortgagee were held to be a trustee for the mortgagor, it would follow that, as every reasonable expense incurred by the trustee would be chargeable upon the trust fund, a premium of insurance on buildings held for security, honestly and judiciously made, would be a charge on the fund, as much so as necessary repairs. But, in the absence of contract, no such charge is allowed to the mortgagee, in taking an account on a bill to redeem. *White v. Brown*, 2 Cush. 412. Certainly, before entry for condition broken, the relation of mortgagee and mortgagor is that of contracting parties, and not that of trustee and *cestui que trust*.

T But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration; let us examine it. Is it a double satisfaction for the same thing, the same debt or duty?

The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt?

He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration, (in other words, the computed chances of loss,) the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. He then pays the whole consideration, for a contract made without fraud or imposition; the terms are equal, and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party, upon a separate and distinct consideration paid by himself. The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insurance. A man gets \$1,000 insured for \$5, for one year, and the building is burnt within the year; he gets \$1,000 for \$5. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burnt in any one year, and the premium is equal to the chance of loss. But suppose — for in order to test a principle we may put a strong case — suppose the debt has been running twenty years, and the premium is at five per cent, the creditor may pay a sum, equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premiums paid.

What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received, in money loaned; nor to the underwriter, for he has only paid

upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent.

It may then be said, that, upon these grounds, a wager policy might be held valid, and a good ground of action. We suppose a wager policy is not held void because it is without consideration, or unequal between the parties; but because it is contrary to public policy, and prohibited by positive law. But, independently of considerations of public policy, if an insurance were made on a subject in which the assured has no pecuniary interest—although in other respects he may be deeply concerned in it, and on that ground be willing to pay a fair premium—made with a full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid as between the parties. But upon the strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies, without interest, are justly held to be void.

We are not unaware, that there are very respectable authorities opposed to the views of the law above taken.

Mr. Phillips, in treating of the rights of parties after an abandonment, seems to put the rights of the underwriter, who has paid a loss, on the ground of subrogation, and then adds: "Where a policy against fire is effected by a mortgagee for his own benefit, in case of loss, and payment by the underwriters, they thereby become entitled to a proportional interest in the debt secured by the mortgage." 2 Phil. Ins. (2d ed.) 419. In support of this position, the learned author cites several authorities, which we propose to examine.

Robert v. Traders' Ins. Co. 17 Wend. 631. We think this case does not support the position for which it is cited. The mortgagor was the assured, and had assigned his policy to the mortgagee. Of course, it was the interest of the mortgagor which was insured, and it was assigned by him to the mortgagee, as a further collateral security. A suit was brought in the name of the mortgagor, the assured, but for the benefit of the mortgagee, and judgment obtained against the insurers; and before the satisfaction of that judgment, the mortgage

debt was paid to the mortgagee by the mortgagor, by coercion, to avoid foreclosure, and the interest of the mortgagee was thus determined; and it was insisted by the defendants, that this satisfaction of the debt discharged the judgment on the policy. But it was held otherwise, and that the mortgagor was entitled to recover the insurance. The effect of this adjudication was, that it was an insurance made upon the interest, at the expense, and for the ultimate benefit of the mortgagor; that the assignee had a right to recover to his own use, until the payment of his debt, and then held as trustee for the mortgagor. This case, we think, affirms the principles on which we proceed.

Mr. Phillips also cites *Tyler v. Aetna Ins. Co.* 16 Wend. 385. Some portion of the language of the chancellor, in giving the judgment of the court of errors, in that case, is certainly more in point. He states, that one who has a lien on land and buildings for unpaid purchase money, has an insurable interest, and may insure and recover to the whole amount of the unpaid purchase; but he adds, that when he shall receive that money from the purchaser, he will be bound, by the principle of equitable subrogation, to account for it to the insurers who have paid his loss. The case went through several courts, and is somewhat complicated. As we understand it, these latter remarks of the chancellor stated a principle not necessary to the decision of the case. The questions were, whether the plaintiff, who held a bond for a deed, an equitable title only, had an insurable interest, and whether he had any prior insurance when the policy was made. It was held, that a policy obtained by his vendor, the owner of the fee, was not an insurance in which this plaintiff had, or could have, any interest, and therefore, that it was no insurance for him. The remarks above cited applied to the policy obtained by the owner of the fee, which would cover his debt only, and subject him to account, in case of receiving the money from the debtor after recovering it from the underwriters. Whether such would be the consequence or not, could make no difference, in regard to the right of this plaintiff to recover of these defendants, and was not, therefore, embraced in the judgment.

Looking at the analogies and illustrations on which the reasoning of the learned chancellor is founded, it may be a question, whether he has not relied too much on the cases of marine insurance, in which the doctrines of constructive total loss, abandonment, and salvage, are fully acknowledged, but which have slight application to insurances against loss by fire.

We are then brought to the case of *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495. The language of Mr. Justice Story, in giving the opinion of the court in that case, is certainly very strong; but the part of it which bears upon the point of the present case was not necessary to the judgment of the court. The question for the court was, whether Carpenter, the plaintiff, had a prior insurance on the premises at the time of making this policy, not disclosed. In fact, he had before made an insurance on his own interest, for the purpose of assigning it to a mortgagee, and had assigned it to a mortgagee; so that it was insisted, that it was not a prior assurance to himself, when he obtained the policy now in suit. But it was held, that, being a policy made by the mortgagor on his own interest, and assigned to his mortgagee, as a further collateral security, it was in legal effect an insurance for himself; because, if recovered by the assignee, it would go to pay his own debt, *pro tanto*, and relieve him; if his debt was otherwise paid, the assignee would recover as trustee to the mortgagor; so that, either way, it was an assurance for him. The judge is pointing out the difference between an insurance of the interest of a mortgagor, assigned by him to his mortgagee, and an insurance direct to a mortgagee, on his interest as mortgagee, and then states that his interest is the debt, and that, if he first recovers of the underwriters, as he may if his debt is not paid, and afterwards the debt is paid by the mortgagor, he will hold the money in trust for those insurers who have paid him his loss. It is obvious, we think, that these last observations were merely following out a train of thought, suggesting the distinctions between the two species of insurance, and that the principle announced was not necessary to the decision, and may not, therefore, be necessarily con-

King v. The State Mutual Fire Insurance Company.

sidered as the judgment of the court. Indeed, it may have been the learned judge's own first impression, without having carefully considered it, in all its relations. Any statement of legal principle from so high a source is entitled to great respect; but under the circumstances we cannot deem it conclusive.

It is obvious to remark, as the result of all these cases, concurring with many others, that a mortgagee has an insurable interest; that he may insure generally on the property, and need not disclose the peculiar nature of his interest, unless inquired of; that, before payment of his debt, he may recover and receive to the amount of his debt; and that it is no defence for the underwriter, that the plaintiff holds a defeasible, and not an absolute, title to the property insured.

Some other cases are referred to, as analogous, but the analogy is not very clear or direct.

In *Godsall v. Boldero*, 9 East, 72, a creditor made insurance on the life of Mr. Pitt; Mr. Pitt died insolvent whilst the policy was in force, and an action was commenced. Before it came to trial, the debt was paid by the executors, from funds furnished by parliament for that purpose, and it was held to be a bar to the plaintiff's action. Strictly speaking, one can have no interest, in the nature of property, in the life of another; and we think that this case, influenced to some extent by existing English statutes, was decided on the ground that the interest was terminated when the debt was paid. Besides, it might well be maintained, that, in consequence of Mr. Pitt's devotion to the public service, and in honor to his memory, the government intended by the public bounty to provide that no one should suffer pecuniary loss by his insolvency; and that to permit the plaintiffs to recover, would be to throw a loss on the insurers, for which they could have no indemnity. The bearing of this case upon the present is but slight.

In a recent edition of Kent's Commentaries, the principle, that the insurer on the interest of a mortgagee, as such, on payment of a loss, is entitled to a proportion of the mortgage debt, is stated in a note, on the authority of *Carpenter v. Pro-*

King v. The State Mutual Fire Insurance Company.

vidence Washington Ins. Co.; but it seems to add nothing to the weight of that authority.

On a view of the whole question, the court are of opinion, that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use.

Judgment for the plaintiff.

NOTE. Since the foregoing decision, a case has been published here, as decided in England about the same time, by vice-chancellor Wigram, involving the same principles. *Dobson v. Land*, 8 Hare, 216. The case, with a review of it from the London Jurist, will be found in 13 Law Reporter, 247.

The question there was upon the other branch of the proposition — whether a mortgagee in possession, on stating his account under a bill to redeem, had a right to charge premiums of insurances, obtained by himself, on buildings constituting part of the mortgaged property, and add the same to the principal and interest of his debt; and it was decided that he could not. It was conceded that this involved the correlative proposition that, if the mortgagee had received any sum by way of loss on such policies, he would be under no obligation in equity to credit it to the mortgagor, or be responsible to him for it.

In the review of this judgment, appended to it in the Law Reporter, a strong effort is made, and many authorities cited, to prove that the principle adopted by the vice-chancellor was incorrect. But it is obvious to remark, that, even if the reviewer were right in questioning the correctness of the above decision, he places his reasoning on grounds which would be applicable to an English mortgage only, and not to a mortgage in Massachusetts. The grounds are, that, by the law of England, when the condition of the mortgage is broken by the non-payment of the debt on the day stipulated, the title

May & others v. Breed & another.

of the mortgagee becomes absolute at law; that the right to redeem is the mere creature of a court of equity; that, upon the maxim, that he who seeks the aid of a court of equity must do equity, in doing this equity, he must reimburse to the mortgagee every reasonable expense which he has incurred on account of the mortgaged premises; and that an insurance on buildings is a reasonable and proper expense, and therefore that it should be chargeable; also, that the mortgagee is trustee for the mortgagor, and must account for every profit and benefit derived from the trust property; that, as his ability to insure, or insurable interest, is derived from the trust property, on general principles he is accountable for it to the *cestui que trust*. As to the last ground, the fiduciary relation, it was held by the judgment not to exist. As to the other, were it sound as applicable to English mortgages, it could not apply to a mortgage regulated by the laws of this state, where the rights of the parties depend on contract, and not on trust, and where the right to redeem is a right as well created, established, and regulated by law, as the right to foreclose.

SAMUEL MAY & others vs. RICHARD F. BREED & another.
SHEPHERD H. NORMS vs. SAME.

A discharge, under the English bankrupt law, of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in this state; whether the creditor proved his debt under the English commission of bankruptcy or not.

THE first named case was an action of assumpsit, brought against the defendants as acceptors of a bill of exchange, of which the following is a copy: "Boston, May 30, 1839. Exchange for £1,000 stg. Sixty days after sight of this first of exchange, (second and third not paid,) pay to the order of Messrs. Samuel May & Co., in London, one thousand pounds sterling, value received, and charge the same to account of

May & others v. Breed & another.

Eben Breed. To Messrs. R. F. Breed & Eccleston, Liverpool." The defendants accepted the bill at Liverpool, by writing the following words on its face: "No. 1594. June twenty-fifth, at Messrs. Prescott, Grote, Ames, & Co. R. F. Breed & Eccleston." Prescott, Grote, Ames, & Co. were bankers in London. When the bill became payable, it was duly presented for payment, which being refused, it was then duly protested for non-payment.

At the time when the bill was drawn, and when it was accepted, the defendants were partners, resident in and carrying on business at Liverpool, in England, under the firm of R. F. Breed & Eccleston. R. F. Breed was born in Massachusetts, in 1781, and resided there till 1804, when he went to England, where he has ever since resided, and carried on business as a merchant. The other defendant, Eccleston, was and is a British subject. The bill was drawn in Boston, Massachusetts, and bought here by the plaintiffs of Eben Breed, the drawer. When the bill was drawn, the plaintiffs were citizens of Massachusetts, residing in Boston, and they have ever since continued so. Eben Breed, the drawer of the bill, was also a citizen of Massachusetts when the bill was drawn. The defendants have obtained a certificate of discharge, under the English bankrupt law, dated the 24th of February, 1841. The plaintiffs did not prove their claim against R. F. Breed & Eccleston's estate, and have received no dividend. Two dividends have been declared and paid to other creditors, who have proved their claims, and the settlement of the estate is not yet closed.

The case was submitted upon the foregoing statement of facts, with the agreement that the court might order a non-suit or default, or make such other order as the case might require.

The case was argued at March term, 1849.

S. E. Sewall, for the plaintiffs.

It is admitted, that foreign laws have no authority, as laws, out of the jurisdiction which enacts them. To give effect in this state to the English bankrupt laws, is a mere matter of comity. And this court will refuse to give them any effect,

when it would be injurious to the rights of our citizens. 2 Huberus, lib. 1, tit. 3, *de const. leg.* § 2; Story Conf. §§ 29, 32, 244; *Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, 13 Mass. 20, 23; *Ingraham v. Geyer*, 13 Mass. 146.

A discharge, without the consent of the creditor, of the person and all subsequently acquired property of a debtor who does not pay his debts in full, is unjust, and ought never to be allowed any effect by the courts of a foreign country, except against citizens of the country where the discharge is obtained. A foreign creditor has not the means of detecting fraud, and has practically no opportunity of resisting a discharge.

A discharge in bankruptcy is a judgment of a court, between the creditors within the jurisdiction on the one side, and the bankrupt on the other, and cannot affect those creditors who were never within, and never submitted to, the jurisdiction. The principles of eternal justice forbid the passing of a judgment against any one without first hearing him. Story Conf. §§ 546, 547, 549, 586; *Bissell v. Briggs*, 9 Mass. 462, 468; *Hall v. Williams*, 6 Pick. 232, 239; *Woodward v. Tremere*, 6 Pick. 354; 3 Phil. Ev. (Cow. & Hill's notes,) 906, 907; *Ogden v. Saunders*, 12 Wheat. 213, 366; *Odwin v. Forbes*, 1 Buck, 57, 61. The only notice of proceedings required in England is publication in the London Gazette. 6 Geo. IV. c. 16, § 25, Eden, B. L. Appx. 36. Much less effect is given to foreign judgments by the French law than by ours; if a Frenchman fails in a suit abroad, he may sue again in France. Story Conf. § 616; Merlin Quest. de Droit, Jugement, § 14; 10 Touillier Droit Civil, (5th ed.) 121 to 127. By the civil law, the law of the place of the contract does not govern, unless the defendant or his property is found there to give jurisdiction. 3 Burge Col. and For. Law, 1018; J. Voet ad Pand. lib. 5, tit. 1, §§ 73, 74; Johnston's Civil Law of Spain, 297, note. The English cases are collected in Eden B. L. (2d ed.) 420 to 424. And see *Pedder v. MacMaster*, 6 T. R. 609; *Armani v. Castrique*, 13 M. & W. 443, 447, where Pollock, C. B., says, "A foreign certificate is no answer to a demand in our courts; but an English certificate is surely a

discharge as against all the world in the English courts." There is no English case in which the court have held a foreign discharge binding against an English citizen.

The decisions in this state establish the doctrine, that a foreign discharge in bankruptcy cannot be set up here against our citizens. *Proctor v. Moore*, 1 Mass. 198; *Baker v. Wheaton*, 5 Mass. 509; *Watson v. Bourne*, 10 Mass. 337; all of which were decided before any discussion arose on the constitutional prohibition against impairing the obligation of contracts. *Blanchard v. Russell*, 13 Mass. 1, is the only Massachusetts case opposed to this view, and is overruled by *Ogden v. Saunders*, 12 Wheat. 213. In *Braynard v. Marshall*, 8 Pick. 194, 197, Parker, C. J., recognizes the authority of the earlier cases, which he had misrepresented in *Blanchard v. Russell*. And see *Prentiss v. Savage*, 13 Mass. 20; *Tappan v. Poor*, 15 Mass. 419, 422; *Blake v. Williams*, 6 Pick. 286, 306; *Agnew v. Platt*, 15 Pick. 417; *Bells v. Bagley*, 12 Pick. 572, 579; *Savoye v. Marsh*, 10 Met. 594; *Fiske v. Foster*, 10 Met. 597; *Springer v. Foster*, 2 Story, 383; *Shaw v. Robbins*, 12 Wheat. 369, note.

The case of *Ogden v. Saunders*, 12 Wheat. 213, is directly to the same point. It was not decided on the ground that a bankrupt or insolvent discharge impairs the obligation of a contract; but on the ground that, on principles of international law, such a discharge could have no extra-territorial operation. See opinions of Johnson, J., 12 Wheat. 274, 359. And his opinion in that case is to be considered as the opinion of the other judges, Marshall, Duval, and Story, who, concurring with him, constituted the majority of the court. By Marshall, C. J., and Story, J., in *Boyle v. Zacharie*, 6 Pet. 348, 643. See also *Woodhull v. Wagner*, Baldw. 296, 300.

But if the decision in *Ogden v. Saunders* was based on the ground, that a discharge in bankruptcy, under a state law, impairs the obligation of contracts, then the inviolability of contracts, being a great constitutional principle, interwoven in our national jurisprudence, as well as a principle of natural justice, the court, in their discretion, ought to apply this principle to the case of a foreign discharge.

And if the decision in *Ogden v. Saunders* was based on the ground last stated, then it proves that the bankrupt law of the country where a contract is made is no part of the contract, and that a discharge under such law is no more available here than one obtained in any other place.

There is another rule of law, leading directly to the same conclusion. It is now well established in the United States, in opposition to the English authorities, that an assignment under a foreign bankrupt law cannot be set up against American creditors here. *Ogden v. Saunders*, 12 Wheat. 360, 365; *Blake v. Williams*, 6 Pick. 286; *Milne v. Moreton*, 6 Binn. 353; *Harrison v. Sterry*, 5 Cranch, 289, 302; Story Conf. §§ 403, 409; 2 Kent, 406, et seq.; *The Watchman*, Ware, 232, 237. The reasons, on which these decisions are founded, apply with at least equal force to the case of a foreign discharge. There is a great show of equity in the claim of assignees to the bankrupt's property, for the general benefit of all his creditors; but there is no equity in the bankrupt's claiming his after-acquired property, without paying his debts out of it. The protection of our citizens is the object in each case; and it is as important to guard them against unfair discharges as against unfair bankruptcies. On the same principle, in cases of ancillary administration here, the court will not order assets here to be sent abroad, until creditors here are first paid. *Dawes v. Head*, 3 Pick. 128; *Richards v. Dutch*, 8 Mass. 506.

Story, in his *Conflict of Laws*, § 341, misrepresents the ground of the opinion of Johnson, J., in *Ogden v. Saunders*. And the authorities from the civil law, which he cites in §§ 331, 331 a, do not bear out his doctrine; they speak of cases of rescission, or of payment, or other performance of the contract, and not of the case of a discharge in bankruptcy. See 2 Boullenois des Statuts, etc. 447, 448, 456 to 459, 462, 472. Those American cases cited by Story, in § 335, which are unfavorable to the plaintiff, were decided before *Ogden v. Saunders*, and are therefore not entitled to much weight. The opinions of Story and Kent, on this point, are influenced by their strong bias in favor of foreign bankrupt laws, both as

May & others v. Breed & another.

to the effect of assignments and of discharges. See 2 Kent, 393.

But there is another, and a special reason, why this court should deny effect to a discharge under the English bankrupt law, in the preference which it gives to certain classes of British creditors, and especially to the crown. 6 Geo. IV. c. 16, § 48; Bac. Ab. Prerogative, (E.) 5; Eden B. L. (2d ed.) 413; 1 Christ. B. L. 361, 531, 539, 540; 1 Cooke B. L. (8th ed.) 496.

R. Choate, also for the plaintiffs.

Every state is at liberty to give or withhold effect to a foreign law, without giving offence to any foreign government. The law of nations does not give effect to a foreign code. The question is to be decided by expediency, of which justice to our own citizens is the principal rule. There is no public law of morality or kindness which will raise the presumption that we have adopted this provision of the English bankrupt law. See Story Conf. §§ 23, 25, 26, 29, 31, 32, 34 to 38.

Is it judicially shown, that this state has consented to adopt the part of the English bankrupt law concerning discharges; or ought it now to adopt it, as against citizens of Massachusetts? The question is partly historical and partly judicial.

We cannot have adopted this law before 1789, for we were then a colony, and (1.) the English laws did not bind the colonies. *Holmes v. Remsen*, 20 Johns. 229, 260; *Blake v. Williams*, 6 Pick. 310, 312. We were free to accept or reject them. (2.) It cannot be presumed that we did it voluntarily, for England had not then promulgated the doctrine. (3.) No other jurisprudence on earth had then adopted it. The *cessio bonorum*, only, prevailed on the continent of Europe until long after. (4.) From the state of our own insolvent law, the court will infer, that it was not then deemed, in a legal or moral sense, either just or politic to adopt it. Down to 1838, we did not think it right to take away a debt without payment. (5.) No nation is presumed to adopt a foreign bankrupt law without reciprocity. Our *cessio bonorum*, or personal discharge, which was the only one recognized here, did not discharge a debt in England.

Not having adopted the principle while a colony, how does the case stand under the constitution of the United States? That constitution is a new and formal embodiment of national policy; and, by prohibiting the states from passing any law impairing the obligation of a contract, establishes the principle, that it is impolitic and unjust for one state to discharge contracts due to citizens of another. There is a greater degree of comity between different states of our Union than between foreign nations. By Taney, C. J. *Bank of Augusta v. Earle*, 13 Pet. 519, 590 to 593. This state cannot be presumed to give effect to a discharge obtained in a foreign country, when the constitution declares that a discharge in a sister state shall have no effect. No court will presume that we have adopted a law contrary to national policy or national ethics. Story, Confli. § 33; 1 Cooke B. L. (8th ed.) 488; *Odwin v. Forbes*, 1 Buck, 57, 60; 2 Huberus, lib. 1, tit. 3, § 2.

The bankrupt law of England is a legislative system. Comity is the adoption or rejection of an entire system. We ought not to take a part of a system without the whole. It is settled law, that we reject that part of the English bankrupt act, which distributes the bankrupt's effects; and that part being rejected, the other cannot be deemed to be adopted. 1 Bell Com. 9; *Burroughs v. Jamineau*, Mosely, 1. A foreign code should be adopted by legislation or treaty, not by adjudication.

W. Dehon, for the defendants.

The nature, construction, incidents, and legal effect of a contract are determined by the law of the place where the contract is made or to be performed. The question, whether a contract has been discharged by law—whether it has any subsisting legal obligation, capable of being enforced—comes within this principle, and does not relate to the remedy. *Burrows v. Jemino*, 2 Stra. 738; Anon. 1 Bro. C. C. 376; *Robinson v. Bland*, 1 W. Bl. 256, 259; *Talleyrand v. Boulanger*, 3 Ves. Jr. 447, 449; *Melan v. Fitzjames*, 1 B. & P. 138; *Odwin v. Forbes*, 1 Buck, 57, 63; 1 Chit. Com. & Man. 654; 2 Bell Com. 602; 3 Burge, Col. & For. Laws, 874 to 876; 2 Kent, 459; Story, Confli. § 331; *Pittin v. Thompson*, 13 Pick.

64, 68; *Warder v. Arell*, 2 Wash. Va. 282, 295, 298; *Powers v. Lynch*, 3 Mass. 77; *Thompson v. Ketcham*, 8 Johns. 189; *Bartsch v. Atwater*, 1 Conn. 409; *Hull v. Blake*, 13 Mass. 153; *Houghton v. Page*, 2 N. H. 42; *Ory v. Winter*, 16 Martin, 277; *Harrison v. Edwards*, 12 Verm. 648, 652; *Williams v. Wade*, 1 Met. 82; *Warren v. Copelin*, 4 Met. 594; *Hayden v. Davis*, 3 McLean, 276; *Worcester Bank v. Wells*, 8 Met. 107. Various reasons are given in the authorities for this rule; some stating that the law enters into and forms one of the elements of the contract; others, that the law does not enter into the contract, but follows and acts upon it, wherever it goes; others, that there is an implied contract, to be governed by the local law; and others, that the sovereign law operates on all contracts made within its sovereignty, and is to be recognized by the comity of states. But, whatever be the reason, the rule is well established. Whenever a contract is sought to be enforced in a foreign forum, the law of its origin comes with it; and the court examine, first, whether any right or obligation was ever created by the law of its origin; and, secondly, whether that right or obligation still subsists, or has been discharged; and if it never had any legal existence, or has been legally discharged, the court will not enforce it, because that would be to create a contract between the parties, not to enforce one already existing.

There is nothing in principle to distinguish a discharge in bankruptcy from other discharges, by confiscation, tender, want of funds, wrong demand, payment under trustee process, or other causes, such as have been held good discharges in the authorities above cited; except that some of these depend on far less equitable considerations.

The validity of a foreign discharge in bankruptcy is fully recognized in England, and in this country. *Ballantine v. Golding*, 1 Cooke, B. L. (8th ed.) 487; *Potter v. Brown*, 5 East, 124; *Odwin v. Forbes*, 1 Buck, 57; *Edwards v. Ronald*, 1 Knapp, 259; *Quelin v. Moisson*, 1 Knapp, 266, note; 3 Burge, Col. and For. Laws, 876, 925; 2 Kent, 393; Story Confli. § 335; *Green v. Sarmiento*, Pet. C. C. 74; *Van Reimsdyk v. Kane*, 1 Gallis. 371; *Hicks v. Brown*, 12 Johns. 142; *Le Roy v.*

Crowninshield, 2 Mason, 151, 161, 172, 175; *Sherrill v. Hopkins*, 1 Cowen, 103; *Ogden v. Saunders*, 12 Wheat. 213; opinions of Washington, J. 254, 259, 264; Thompson, J. 297, 300, 302; Trimble, J. 317, 320 to 324; Marshall, C. J. 333, 343, 347; Johnson, J. 281, 285. See also the following cases, decided since *Ogden v. Saunders*: *Parkinson v. Scoville*, 19 Wend. 150; *Bronson v. Kinzie*, 1 How. 311, 319, 321; *McCracken v. Hayward*, 2 How. 608, 612; *Towne v. Smith*, 1 Wood. & M. 115, 132; *Lizardi v. Cohen*, 3 Gill, 430, 438; *Cook v. Moffat*, 5 How. 295. The principle for which we contend has been admitted by all the judges in these cases, except Johnson, J., and his first opinion, in *Ogden v. Saunders*, is at variance with his last. It has been recognized repeatedly by our courts. *Blanchard v. Russell*, 13 Mass. 1, 6, which cannot be considered as overruled on this point by *Ogden v. Saunders*, (see *Hall v. Williams*, 6 Pick. 232, 243); *Bradford v. Farrand*, *Walsh v. Farrand*, and *Prentiss v. Savage*, 13 Mass. 18, 19, 20; *Coolidge v. Poor*, 15 Mass. 427; *Cockayne v. Sumner*, 22 Pick. 117.

Like the English bankrupt law, our insolvent law discharges the debtor from all debts, founded on any contract made by him after the act took effect, if made or to be performed within the commonwealth, St. 1838, c. 163, § 7; the preferences under our law are similar, § 12; and its general policy the same.

In deciding this question, this court represents a sovereign state, and no constitutional provision restrains its powers. Bankrupt laws are now universally deemed humane and just. The English courts would recognize our law, discharging a debt under similar circumstances. *Potter v. Brown*, 5 East, 124. The comity of states, and the commercial interests of the citizens of both countries require the recognition of this important principle; and its adoption will tend to secure an impartial division of bankrupt estates among creditors of both countries.

C. G. Loring, also for the defendant.

It may be true, that to discharge a debt without the consent of the creditor is unjust; but a discharge under the bank-

rupt law of the country, where the contract is made and to be performed, cannot be said to be without the consent of the creditor. A bankrupt, as a member of a commercial community, has the right to a discharge from his debts on a *bond fide* surrender of his estates; and this right is recognized by the jurisprudence of all commercial countries. The law of the place of performance, common and statute, constitutes a part of the contract, whether made with a party within or without its jurisdiction. Marshall, C. J., in *Ogden v. Saunders*, 12 Wheat. 338, intimates that insolvent laws are remedial, and that therefore the legislature may alter them. This may be so; but still they are contemplated by the parties as elements of the contract, until changed by competent legal authority, and, therefore, if existing at the time of the fulfilment of the contract, they are to govern its obligation or discharge.

The answer to the argument upon the hardship that the discharge should affect a foreign creditor, who has no opportunity to contest it or prove it fraudulent, is, that by entering into such a contract, he submitted himself to these disadvantages. Besides; it would be much harder on the honest debtor, who has surrendered all his property under the laws which he contemplated at the time of making the contract, to enforce against him a contract which, by those laws, has ceased to exist.

The discharge is not a judgment, but one of the modes of determining or dissolving the contract, which the parties must have contemplated. But if it is a judicial proceeding, the bankruptcy court have jurisdiction by virtue of the previous consent given by the parties, by entering into the contract. The primary object of bankrupt laws is not to relieve the debtor, but to benefit his creditors, by securing an equal distribution of his effects among them all, foreign as well as domestic, and his discharge is only a consequence of the application of this remedy. After the discharge, the debt is at an end; 12 Wheat. 343; but until the discharge, the proceedings in insolvency are merely remedial, and do not prevent the creditor from prosecuting his claim in his own country, or elsewhere; and a foreign court, which had once acquired jurisdiction by the commencement of a suit, would not be divested

of it by a discharge obtained while the suit was pending. The cases of foreign assignments and of ancillary administration are merely a recognition of this principle.

There is no evidence of the law of this commonwealth prior to 1789, and it is immaterial what it was; for if our ancestors were not enlightened enough to adopt the principles of comity, that is no reason why we should not.

The doctrines of reciprocity and of the comity of nations are not founded upon the idea of the similarity of their laws upon the same subject, but upon the great principle of justice towards those who make contracts in foreign countries, to secure to them everywhere the benefit of laws with reference to which those contracts were made. The only question is, whether the foreign nation recognizes the operation of our laws on contracts made and to be performed here.

The decision in *Ogden v. Saunders* has produced much confusion, inequality, and injustice, by preventing the states from extending to each other the rules of comity and equity recognized among all civilized nations. So great were the evils resulting from that decision, that an act of congress was necessary to obviate some of them. Act of 1848, c. 18, (9 U. S. Stat. at Large, 213.) Marshall and Story, who acquiesced in that decision, both distinctly repudiate the grounds taken by Johnson; and their subsequent declarations, in *Boyle v. Zacharie*, 6 Pet. 348, 643, that his opinion is to be taken as the opinion of the majority of the court, cannot be construed to intend all his dicta.

The provision of the constitution of the United States has reference to the mutual intercourse of the people of the states, and not to their relations with foreign countries. And the fact, that we are precluded from the benefits of the comity of nations at home, is no reason for cutting ourselves off from it as to all the rest of the world, and especially as to that nation, with whom we have more commerce than with all others, which has a system precisely similar to our own, and the courts of which have made the first advances towards us in this matter.

The soundness of the decision in *Ogden v. Saunders* has

been doubted by nearly every court that has had occasion to refer to it, including almost every judge now on the supreme court of the United States. See *Cook v. Moffat*, 5 How. 295; opinions of Grier, J. 307; Taney, C. J. 310; Daniel, J. 313; Woodbury, J. 315. The Massachusetts decisions must govern this court. The decisions of the supreme court of the United States cannot settle the rule of comity between the different states, much less between any state and a foreign nation. *Cook v. Moffat*, 5 How. 295, 311. The cases in this state, decided since *Ogden v. Saunders*, admit that that case overruled *Blanchard v. Russell*, so far as regards the validity in one state of a discharge obtained in another, but no further; and *Blake v. Williams*, 6 Pick. 286, 306, so far from overruling the general doctrine of *Blanchard v. Russell*, by implication, expressly declares the distinction in principle between laws regulating assignments, and those regulating discharges; and this distinction is recognized in all the authorities. Story Conf. §§ 331, 337; 2 Kent, 459; *Harrison v. Sterry*, 5 Cranch, 289; *Ogden v. Saunders*, 12 Wheat. 213, 343. As to the effect in one state or country of a discharge obtained in another, independently of the constitutional prohibition, see, in addition to the cases already cited for the defendant, *Johnson v. Hunt*, 23 Wend. 87; *Boggs v. Teackle*, 5 Binn. 332; *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. 131; *Sturges v. Crowninshield*, 4 Wheat. 122, 192; *McMillan v. McNeill*, 4 Wheat. 209. J. Voet ad Pand. lib. 4, tit. 1, § 29, p. 240, and 2 Boullenois, 462, support the doctrines laid down in Story Conf. § 331.

Choate, in reply.

Story considers that Massachusetts has established a more limited doctrine than that contended for by the defendants. Story Conf. § 340. The cases in 1, 5, and 10 Mass. are strong evidence that, previous to 1809, we rejected the doctrine. In *Blanchard v. Russell*, 13 Mass. 1, 9, Parker, C. J., speaks of the principle as new, not as well settled. And in *Blake v. Williams*, 6 Pick. 306, he admits that *Blanchard v. Russell* is overruled on this point by *Ogden v. Saunders*. The only English cases, previous to 1789, are *Burrows v. Jemino*, 2 Stra. 733,

better reported in *Moseley*, 1, in which the nature of the acceptance formed a condition of the contract, and the holder of the bill had actually litigated the question in the courts of Leghorn; *Robinson v. Bland*, 1 W. Bl. 257, 259, which was decided on the ground that the contract was a gaming contract, absolutely void by the laws of England, where it was to be executed; and *Ballantine v. Golding*, 1 Cooke, B. L. (8th ed.) 487, in which, as was remarked in *Pedder v. Mac-Master*, 8 T. R. 607, it did not appear but that both the parties resided in Ireland. The case in 1 Bro. C. C. 376, was a case of payment, understood as such, at the time, by both parties.

SHAW, C. J.* This case comes before the court upon an agreed statement of facts. It is assumpsit by the plaintiffs, as payees, against the defendants, as acceptors of a bill of exchange for £1,000 sterling, dated at Boston, May 30, 1839, requesting the drawees to pay that sum to the plaintiffs, or their order, in London, drawn by Ebenezer Breed, payable in sixty days. This draft was addressed to the defendants, R. F. Breed & Eccleston, at Liverpool, and by them accepted, payable at a banking house designated, in London. It was presented at maturity for payment; but payment being refused, it was protested for non-payment. The defendants were partners and resident merchants, carrying on business at Liverpool, when the bill was drawn and accepted. R. F. Breed was a native of Massachusetts, born in 1781, and resided here till 1804; he then went to England, where he has ever since resided, and carried on business as a British subject, and he still lives there. Eccleston, the other defendant, was a British subject, and, as we understand, a native. The bill was sold by Ebenezer Breed, the drawer, to the plaintiffs in Boston. The plaintiffs were resident merchants in Boston, when the bill was drawn, and have ever since continued so. Ebenezer Breed, the drawer, was also a citizen of Massachusetts when the bill was drawn. The defence relied upon is, that R. F. Breed & Eccleston, the defendants, acceptors of the bill, were declared bankrupt, and obtained their certificate of discharge under the English bank-

* FLETCHER, J., did not sit in this case.

May & others v. Breed & another.

rupt law, the certificate having been granted February 24, 1841. The plaintiffs did not prove their debt, under the commission of bankruptcy, against the estate of R. F. Breed & Eccleston, and have received no dividend thereon. Two dividends have been declared, and paid to other creditors, who have proved their claims, and the settlement of the estate is not yet closed.

We have transcribed nearly the entire statement of facts agreed, it being short, and every fact mentioned being significant and material. The question is, whether the plaintiffs, resident citizens of Massachusetts, shall be barred of their action in the courts of this commonwealth, by a discharge from their debts duly obtained by the defendants, under the bankrupt laws of Great Britain.

It is very clear, upon these facts, that the contract, for breach of which a remedy is sought in this action, was made in England, and to be performed in England. The contract between these parties was the contract made by the acceptance of the defendants, to pay the sum drawn for; the bill was presented to them for acceptance by the plaintiffs, or by some person acting as their agent; it was thereupon accepted; and so the contract made in England. It was expressly made payable in London. The case, therefore, upon the facts, is entirely clear of doubt, plain and simple; it is a contract made in England, and to be performed in England, by persons residing and carrying on business in England, with a foreigner, acting therein, by himself, or his agent, if England.

Shortly after the making, and before the performance on this contract, the debtors were placed under a commission of bankruptcy, an adversary proceeding, under and by virtue of the laws of England, against a defaulting trader, upon doing certain acts, indicative of present or impending insolvency. These laws provide, generally, that, upon a trader's doing certain acts, considered acts of bankruptcy, a creditor may apply for and obtain a commission, under which the whole of the trader's property is sequestered and taken into the custody of law, to be administered by officers ap-

pointed for that purpose, the proceeds of which, with some slight exceptions, are appropriated to the payment of all the bankrupt's debts, if sufficient therefor, otherwise to pay them in equal proportions, as far as it is sufficient for that purpose. The same law further provides, that if the bankrupt will honestly and faithfully coöperate in the proceeding, if he will disclose all his property and effects, and aid the officers appointed for that purpose by information and by all means in his power, and do all the duties required of him in the premises, he shall be absolved and discharged of all his debts, and receive a certificate, as the authoritative evidence of his right to such discharge. Such were the proceedings instituted against these defendants, in their own country, under the laws of their own country; such was the discharge which they obtained; and they insist that this is a good discharge against a debt previously contracted in that country, due and owing at the time of these proceedings, and which might have been proved under such commission, and in respect to which a dividend might have been received by the creditors. They also insist; that this was a discharge of the debt created by that contract, that it no longer existed as a debt, and that this discharge is therefore a good defence to an action seeking to recover such debt, in whatever country, court or tribunal, such action may be brought.

In the present case, no question can arise as to the place or country to which we are to look for the law, which is the *lex loci contractus*. A difficulty often arises, and cases become exceedingly complicated, (in consequence of the transaction being more or less affected by the laws of various countries,) in determining which, and in what proportion each shall govern; as, for instance, where the contracting parties belonging to different countries, enter into a contract in a third, perhaps to be executed in a fourth, and where a remedy is sought in a fifth. In the present case, beyond question, the law of England is the law of the contract, whatever may be the effect of that law upon the rights and duties of these parties.

L. It seems to be now a well settled rule of law, generally adopted by the courts of all civilized nations, that the law of

the contract is to govern it, and determine the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instrument of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, and the legal duties and obligations imposed by it, and the legal rights and immunities acquired under it.

It has sometimes been made a question, whether the existing law of the country, where a contract is made, by tacit consent of the parties enters into and makes part of the contract, so as to derive its force and obligation from consent; or whether it is the law which follows, accompanies, and regulates the construction of the contract, as a law to which both owe obedience. Perhaps both these considerations have their influence and effect, in applying the rule of the *lex loci contractus*, and depend in some measure upon the terms of the contract itself. So far, it depends upon the use and meaning of language, whether it be used in a popular, legal, or technical sense, and the force and effect of the terms used, and the parties may be presumed tacitly to assent to, and be bound by, the law of the place. Thus, if one give a promise to pay a hundred dollars in sixty days, if this be in the form of a promissory note, by custom, operating in effect as a law, it creates an obligation to pay in sixty three days. But provisions of law of another character, affecting not the words of the contract, but the mode of making and obtaining satisfaction, as they do not spring from the language of the contract, and would not ordinarily be a subject of express provision by contract, may be considered as governing the contract, not by consent, but by force of law. As, for instance, a mortgagor stipulates that the mortgagee shall have the land mortgaged, absolutely, if the debt is not paid at the time stipulated; but the law of the contract, the only law which can govern it, comes in and declares that the title shall not be absolute, but conditional, although the debt is not paid at the time stipulated. This, however, as to the mortgage affecting the realty, may be considered as governed by the *lex loci rei sitæ*; but the same rule would apply in some cases of personal stipulation.

May & others v. Breed & another.

As, where a man binds himself to another, in the sum of one hundred dollars, the obligation to be absolute if the obligor does not pay fifty dollars in one year, the law makes it a debt for the smaller sum only. In both of these cases, we suppose, there is no doubt but the law of the contract would govern it, and it would not be competent for the parties, by any stipulation of their contract, to vary the law in this respect. The rule, therefore, that the *lex loci contractus* shall govern, is derived partly from the presumed consent of the parties, and partly from that law, to which both are subject, and to which both for the time being owe obedience. The contract must be governed by some law, and, no other being referred to, it must be the law of the place.

A question has sometimes arisen, whether the obligation of a contract, made in one country, to be performed in another, arises from the force and effect of the municipal law, either of the place of making or that of performance; or from that universal law of moral obligation, acknowledged by all men above the condition of barbarism, and admitted and carried into effect by the comity of all civilized nations. This may be a difficult and delicate question, in expounding that clause in the constitution of the United States, which prohibits the respective states from passing any laws impairing the obligation of contracts. The construction of this clause may be affected by a consideration of all the provisions of the constitution, of the relative powers intended to be vested in the United States, or reserved to the several states, of the condition of the legislatures of the several states, when they existed as British provinces, and by many considerations not affecting the general question. But if the question were, generally, whether the obligation of a contract is derived exclusively from moral duty and natural obligation, independently of positive law, or from the positive law of the place where it is made, to the exclusion of the moral duty and natural obligation, the controversy would be inconclusive, and lead to no result. We think it would be more correct to say, that each of these considerations has some influence, and that both municipal law and moral obligation concur in constituting the legal obligation of

May & others v. Breed & another.

a contract. And this is true, as well in regard to contracts made and to be executed within the state or country where the remedy is sought, as to those which are to be executed, or where the remedy is sought, in a state or country where the contract is not made. Universal law and natural obligation, on the one hand, and municipal law on the other, are not antagonistic to each other. On the contrary, municipal law assumes the existence of moral duty, arising from natural law, and regulates it, so that it may form a plain and practical rule, adapted to the exigencies of a civilized community.

Natural law and moral duty, acknowledged by all enlightened men, and by the dictates of conscience, must bind men to keep faith and perform all engagements. But this duty is not precise and exact enough to form a practical rule for the government of men in society, in the various exigencies daily occurring. For instance, the law of nature requires that a person competent, in point of age, to make a promise or contract, shall be bound by it. But it does not approach to the determination of the question, what shall be the age of majority. It may well decide that an infant of tender years cannot contract, and that a person of mature years shall be bound by his promise. But between these extremes there is a wide range, within which it requires the positive law of society to provide a precise limit. Shall it be at twenty one, eighteen, or twenty five, or at what age? By the law of England, a person is competent to contract for necessities before twenty one, but not to make contracts generally until that age. Here the law of moral obligation combines with the positive law of the country to constitute the obligation of the contract, holding him bound if made after twenty one, and not before, unless for necessities. This then must be recognized as the law of the contract.

So the law of moral obligation binds one to perform his promise to pay a certain sum of money, without designating time or place. Positive law must determine what constitutes the thing called money, whether it be a particular denomination of coin, or money of account, or what shall be deemed

its equivalent in other coin, all of which are in a high degree artificial and conventional. So it must determine the time and place at which payment shall be due, when and under what circumstances interest shall be paid, the rate of interest, when it shall commence, and the like.

Suppose the law of France fixes twenty three or twenty five as the age of majority and competency to contract, and an Englishman should be sued in France on a pecuniary contract made in England at twenty two, would it not, by the comity of nations, be enforced in France, although the contract derives its obligation partly from the law of natural obligation, and partly from the positive or municipal law of the place of contract? It seems to be agreed on all hands, that contracts made in contravention of a law of the country, such as contracts for the payment of gaming debts and usurious loans, are void; although perhaps a rate of interest allowable by the laws of some countries, but exceeding the rate allowed by the law of the country in which the contract is made, can hardly be said to be contrary to the dictates of moral obligation; and, therefore, if moral obligation, and not the law of the place of contract, were to govern, it ought to be carried into effect when a remedy is sought elsewhere than in the tribunals of the place of contract.

As to the rule upon this subject, considering it upon general principles, without reference to the constitution of the United States, or the restrictions upon the authority of the respective states to pass insolvent or bankrupt laws, but regarding it as a question of the application of foreign laws amongst sovereign states, we think the rule is well expressed by Chief Justice Parker in the case of *Blanchard v. Russell*, 13 Mass. 1, 4. For though this case has been at times considered as overruled, in regard to the operation of a discharge under an insolvent law of one of the United States, yet we think the general principles advanced have been repeatedly recognized as sound law. After suggesting that laws cannot by their intrinsic force operate extraterritorially, but that the courtesy, and comity, and convenience of nations, between whom commerce exists, has sanctioned the admission and

operation of foreign laws relative to contracts, he adds: "So that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless from their tenor it is perceived that they are entered into with a view to the laws of some other state. And nothing can be more just than this principle. For when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conversant of the laws of the place where he is, and to expect that his contract is to be judged of, and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has in some other way excepted his particular contract from the laws of the country where he is."

We consider this doctrine so clear upon principle, and so firmly established by authorities, that it is not necessary to review the series of authorities which might be cited to sustain it.

II. But there is another question more difficult and important, necessary to be considered in determining the present case, affecting the satisfaction and discharge of a contract by any thing short of an actual performance of the thing stipulated to be done. As to the law regulating remedies, it is as clearly settled, and upon most satisfactory grounds, that every case must be governed by the law of the place where the remedy is sought. What species of process a creditor may have by arrest of the person, attachment or sequestration of real or personal property, the time, place, and manner in which, and the tribunal before whom, suit may be brought, are all regulated by the *lex fori*. The time within which an action may be brought, with all exceptions and qualifications, falls under the same head, which must, of course, include all statutes of limitation. But there is a large class of cases falling under neither of these extremes, that is, not depending on construction or interpretation, and still not affecting the mere matter of remedy. We allude to the numerous laws regulating

the execution and performance of contracts, where an exact and specific performance becomes impossible; what shall be deemed and taken to be a good substituted performance, or what shall be the nature and the measure of compensation where the contract is not performed? Indeed, there are few cases where the law can enforce a precise and specific performance of the very thing stipulated to be done; and where it cannot, what law shall determine the equivalent, measure of damages, or substituted performance? Even under the mere law of nature, such cases must occur. An Indian hunter has agreed with another to deliver a given number of carcasses of venison, after the hunting season; but the deer have been all driven away or have perished by disease, and the venison cannot be obtained. But the debtor has been successful in fishing, and has an abundant supply; what, then, does the law of natural justice require him to do, in the performance of his contract? Is it not to deliver to his creditor a quantity of fish equally valuable and useful with the promised venison? And will not the same law regard this as a reasonable satisfaction? In a further advanced stage of civilization, a farmer has stipulated to deliver to a trader a fixed number of bushels of wheat, at harvest, and the wheat is blighted and the harvest fails; what laws shall decide what sum of money, or what amount of other produce, the farmer shall deliver as an equivalent? In the early history of Virginia, contracts were made generally to pay in tobacco. Suppose there was a law of the place that, upon the failure of the crop of tobacco, a given number of bushels of corn should be deemed equivalent to a given number of pounds of tobacco, and should be received as a substitute; would not this law regulate such a contract, either as a tacit condition annexed to it by the parties, or because it was a law to which the parties both owed obedience, and subject to which they must have been presumed to contract?

It appears to us that these laws, affecting, as they do, the nature and character, the force and obligation of the contract, deciding to what extent it binds the parties in all the various contingencies which may occur, what shall be deemed actual

May & others v. Breed & another.

and specific performance, or qualified and substituted performance, or satisfaction for non-performance, are all incidents of the contract. They are not to be governed by the law which affords judicial remedies, legal or equitable, but are to be governed by the law of the contract, whether it be the law where the contract is made, or where by its terms or legal effect it is to be performed.

We again recur to the language of Chief Justice Parker in the case of *Blanchard v. Russell*. After remarking that we must look beyond the law regulating the interpretation of a contract to find the grounds upon which it may be discharged, he says: "We think it may be assumed as a rule affecting all personal contracts, [made by the subject of one country in another,] that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject of, or resident in that country where it is entered into, and no provision is introduced to refer it to the laws of any other country." He then puts, by way of illustration, the precise case now before us, as follows: "Thus, if an American merchant becomes the creditor of an English merchant in England, and the English merchant becomes bankrupt, and obtains a certificate of discharge, the American merchant will be concluded by such certificate; for it is reasonable to suppose that both parties knew of the existence of the bankrupt laws of England, and the contract must be presumed to have been made with reference to those laws. Indeed merchants doing business abroad are always supposed conversant of the laws of the place where they transact their business, and to submit themselves to such laws, and even to such customs as are found there to exist."

The case thus put is directly in point, so far as the question turns upon what may be regarded as the international law upon this subject, as it operates upon contracts, and governs the administration of the laws, between sovereign states. So far as that case turned upon the effect of an insolvent law of one of the United States, acting under the restrictions imposed upon state legislation by the constitution of the United

States, its authority has been shaken by subsequent decisions.

We perceive, also, in this case, the ground upon which the principle is founded. It is this, that the law of the place of the contract, which may be called the law of the contract, gives it its character, makes it what it is, fixes its limits and obligation, fixing the time when it shall commence, how it shall be executed or satisfied, and how it shall be terminated and discharged. When, therefore, such a contract is discharged, by force of the same law which gave it its origin and effect, it is extinguished, and no longer exists as a contract. When, therefore, a remedy is sought upon it in the tribunals of another country, the same international comity, which permits the creditor to demand damages for its non-performance, ought to permit the defendant to show that the obligation no longer exists. The law under which such discharge is obtained can hardly be said, in such case, to have an extra-territorial operation; it operates within the country where the contract was made, in fixing its character and legal effect, which, upon the happening of the contemplated contingency, puts an end alike to its obligation and to its execution.

All sovereign states have authority to regulate their own currency. Suppose the English government, after a debt contracted in England by an Englishman with an American, had passed a law reducing the currency, or increasing the nominal value of gold, so that the number of pounds sterling contracted for could be paid by a less weight of gold, and the American creditor, under protest, and because he could not do otherwise, should receive his debt in the reduced currency, on finding his debtor here, could he sue him and recover the deficiency? We think not; the contract would have been fully satisfied, according to the law of the place of its creation, and of course would be at an end. If, indeed, a law should be passed manifestly fraudulent and colorable in this respect, courts of another country, not bound absolutely by the laws of such country, operating *proprio vigore*, but so far only as comity requires, may refuse to carry such unjust law into effect. So, where an insolvent law is so framed as in

effect and in practice to exclude foreign creditors from availing themselves of the benefit of it, they shall not be bound by it. *Prentiss v. Savage*, 13 Mass. 20.

We are of opinion, that the weight of authority is in favor of the position, that the discharge of a contract by the law of the country in which it was made and to be performed, by a law providing for the appropriation of all one's property for the payment of all his debts, and if insufficient, for an equal distribution, must be considered as determining the contract by the same species of force by which it was formed, *eo ligamine quo ligatur*, and, therefore, that it no longer exists. I shall not now review the authorities critically, but only refer to a few of the leading cases. It seems to be conceded by the learned and copious arguments of the plaintiffs, that the English authorities are to this effect. Among the most prominent are *Ballantine v. Golding*, 1 Cooke B. L. (8th ed.) 487; *Potter v. Brown*, 5 East, 124; *Smith v. Buchanan*, 1 East, 6; Story Conf. § 340. We are of opinion that the weight of American authority is the same way. *Mather v. Bush*, 16 Johns. 233. In this case it was held, that the obligation of a contract is affected by the law of the place where it is made; and that, as a consequence, that law, by determining its legal effect, determines the obligation. It is placed on the ground, that the law of the place of the contract, when it is made and to be performed in such country, not only creates and gives effect to the obligation and duty imposed by it, but determines by what act it shall be deemed paid, satisfied, released, discharged or extinguished. Chancellor Kent's decision, in *Hicks v. Holchkiss*, 7 Johns. Ch. 297, is a clear decision that, where the case is not affected by the constitution of the United States, a discharge under a bankrupt law, legally granted, in the state or country in which the contract is made and to be executed, such law having existed and been in force when the contract was made, extinguishes the contract. "A contract cannot," says the learned judge, (p. 308,) "create a civil obligation in a mode not permitted, and to an extent beyond that prescribed by the established law of the land, existing when the contract is made." In a

very recent case, in Maine, *Very v. McHenry*, 16 Shep. 206, the same principle is affirmed and adopted.

Without going into a more extended review of the decisions of state courts, we are of opinion, that this decision is not opposed by the authority of the supreme court of the United States, as stated in the leading and most elaborate case of *Ogden v. Saunders*, 12 Wheat. 213. It was most ably and fully argued by eminent counsel; it was argued several times, not only with the keenest legal discrimination, but with the closest metaphysical acumen, and every argument brought to bear which could be supposed to have any effect on the question. But, after all, the question turned upon the effect of a discharge under an insolvent or bankrupt law subsisting in one state in respect to a contract made in that state, and to be performed there, of which state both parties were citizens at the time the discharge was obtained, but where the discharge was pleaded and relied upon, as a defence to a suit brought on such contract in the circuit court of the United States, sitting in another state. We think it was discussed and decided upon principles growing out of the relations subsisting between the governments of the several states and that of the United States, and the relative powers of each; the limited powers of sovereignty of the respective states, with an unlimited power of legislation over certain subjects, and the absolute power vested in the government of the United States over other subjects; the latter being supreme to the extent to which it is conferred. It turned, therefore, upon the terms and construction of the constitution, distributing these powers of legislation and government, and imposing an express limitation upon the legislation of the several states upon certain subjects. There was an extraordinary conflict of opinion amongst the judges who decided the case. They all were of opinion, that, notwithstanding the constitution of the United States authorizes the general government to pass a uniform bankrupt law, yet that the several states still had the power to pass an insolvent law, so far as it could be done, without coming in conflict with the provisions of the constitution, or the laws actually made by

May & others v. Breed & another.

congress in pursuance thereof. The question was, as to the nature and limits of such power, and the objects and purposes to which it might extend. When a uniform system of bankruptcy, under a law of the United States, is actually in force, to the extent to which it reaches it must of necessity suspend state laws, because they would be repugnant. If it extended to merchants only, the states might make laws of insolvency in respect to other classes of debtors; and so in regard to all subjects and persons not reached by the United States bankrupt law. Three judges were of opinion, that the law in force where a contract is made, gives character and effect to the contract, either as tacitly referred to by the parties, or as accompanying and governing the contract; that such a law, providing how, on certain contingencies, it should cease and become inoperative, as upon his becoming insolvent and surrendering his property, would affect the contract itself, and, therefore, if this were discharged by force of the same law by which it was created, the discharge would put an end to the contract, and be available ever after as a defence, in whatever state the creditor might seek to enforce it; and that the discharge in the case then in judgment was a bar. Three judges were of opinion, considering the relations amongst the several states when the constitution was adopted, the purpose to establish a more perfect union, to provide a more general and controlling system of distributive justice, in the great relations of debtor and creditor, over the whole union, and that an insolvent law of each state could not, *proprio vigore*, operate extra-territorially, and thus accomplish the great purpose of uniformity contemplated, that, when the constitution of the United States provided for establishing a uniform bankrupt law, and at the same time prohibited the states from making any law impairing the obligation of contracts, the effect was to restrain the states respectively from passing any law which would forever, and under all circumstances, exonerate one from further liability on his contracts; and, therefore, that a state insolvent law, purporting to give such a discharge, was unconstitutional and void, when attempted to be enforced beyond the limits of such state.

One judge was of opinion, that such insolvent or bankrupt law was constitutional and valid, yet affected the remedy only, and not the contract, and therefore afforded no defence to a suit brought in another state, or in the courts of the United States. Four judges ultimately united in holding the discharge in that case void.

The result, we think, is not opposed to the decision in this case, upon the effect and operation of the bankrupt law of England, on a contract made and to be executed there, and discharged by the operation of an act of parliament existing when the contract was entered into, and having the full force over the persons contracting, to the extent to which any law could affect the contract. The case of *Ogden v. Saunders* affected only the discharge obtained under a law of a state with limited powers, and in that case some of the judges held that the general power was expressly restrained. It seems to us that, could the law have been regarded as general and unrestrained by the constitution of the United States, they would have concurred in the opinion that the discharge would have been valid.

III. It is then argued, that such cannot be the rule, because the assignee of a foreign bankrupt cannot come here and claim the property and choses in action of the bankrupt. We have been strongly pressed by the argument that, inasmuch as assignees of an English bankrupt cannot sue for and recover debts due the bankrupt, therefore the bankrupt law has no extraterritorial operation, and cannot give effect to a certificate of discharge, when set up here in bar by an English bankrupt. But we cannot perceive the force of this reasoning. The two things are not irreconcilable; they stand on different grounds, and depend on different and distinct principles. Though the point has been long doubted, we consider it as now settled by a preponderance of authority, that, when a debt due by an American merchant to an English bankrupt is attached by an American creditor of the English bankrupt, by a trustee process, or process of foreign attachment, the assignees of the English bankrupt cannot come in and interpose such assignment to defeat such attachment, and claim the

assets as by a prior title. *Le Chevalier v. Lynch*, 1 Doug. 170; *Blake v. Williams*, 6 Pick. 286; *Holmes v. Remsen*, 4 Johns. Ch. 460, and 20 Johns. 229; 2 Kent, Com. 405. But this is the extent to which the authorities go. It by no means follows, that the English bankrupt law has no effect here. On the contrary, we think it would enable the assignees to take possession of, and appropriate to the use of the creditors, personal property not attached or otherwise subject to any lien under our laws, and also to collect and receive all moneys due the bankrupt, and give a good discharge therefor, and sue for and recover them, either in their own name or in the name of the bankrupt, if not attached or held by any process or lien, by any other creditor. It was so admitted, we think, by implication and in effect, in *Blake v. Williams*. Our law recognizes the rule that rights to personal property, including debts, are to be disposed of according to the law of the domicile of the owner, as well *inter vivos*, as in case of the owner's decease; but as this law can operate beyond the country of the owner only by comity, it is taken with this limitation, that it shall not operate injuriously to the citizens of the state, whose laws are invoked to carry it into effect. *Dawes v. Head*, 3 Pick. 128; *Blake v. Williams*, 6 Pick. 286. So the title of the assignees, both to personal property and choses in action, is recognized and admitted, so far as it can be without affecting injuriously the claims of domestic creditors. But then comes in another well established principle, that every government may by positive law regulate and direct as it pleases all personal property found within its jurisdiction; and may therefore prefer its own attaching creditors to the claims of any foreign assignee, and no other state has authority to question its determination.

In the opinion of Chancellor Kent, in the case of *Holmes v. Remsen*, 4 Johns. Ch. 460, he remarks upon the apparent inconsistency in practice, on this subject, as it has been alleged, which will give effect to the assignment, and not give effect to the certificate. But admitting that there is a want of harmony in this respect, he adds, "it will not affect the binding force of the rules taken separately." And we think

the obvious reason is, that they are drawn from separate sources, and the admission or rejection of the one does not involve the admission or rejection of the other. Considering, therefore, what the weight of authority now is, to which chancellor Kent, contrary to his opinion in *Holmes v. Remsen*, now assents, (2 Kent Com. 405,) that the assignee of a foreign bankrupt will not have a right to defeat the attachment of a domestic creditor, made in conformity with the laws of his own state, it is founded on the principle, that the foreign assignee can claim to sue here, not by positive law, but by comity only, and that this comity will not be yielded when it would tend to injure the citizens of the state where the remedy is sought, and that every state has both the right and the power to control and regulate personal property found within its limits; and having given such rights to its own citizens, they shall not be taken away by the application of the principle of comity. This principle is entirely distinct from that which gives effect to the certificate of discharge of a bankrupt, against a debt contracted in the country of the bankrupt, and to be executed there.

IV. It is objected to the admission of this certificate, under the principle of comity, that the English bankrupt law is unequal and unjust. It is said to be unequal, because it gives a preference to certain debts due the crown, to be paid in full. To this, there are two answers: First, this principle, of the priority of a public debt, is common to all bankrupt and insolvent laws, also in case of deceased insolvents; and, secondly, foreign creditors are put on the same footing of equality with English creditors. It is then said, that the law is unjust in giving a discharge of the entire debt without full payment. The first answer is, that it provides for the payment of the debts in full, if the funds are sufficient for that purpose. If they are not paid in full, it is because it is impossible. *Ad impossibilia lex non cogit*. It is amongst the contingencies known when a debt is contracted, that the debtor may be unable to pay it, and in that event, full payment is not to be expected. The whole effect of the law then is, (for it takes all the debtor's property,) to except his

May & others v. Breed & another.

future earnings and acquisitions. But this is only on condition that he will surrender all his property, and faithfully coöperate with his creditors, to pay as far as possible. Taken as a system, it may well be maintained that such a system is favorable to creditors, and affords them the best means of obtaining satisfaction. Especially is this beneficial to foreign creditors, who, not being on the spot, cannot use the same diligence to collect their debts as domestic creditors.

It is said the constitution of the United States holds it immoral, because such a law impairs the obligation of contracts. Even as expounded by a majority of the judges, in the case of *Ogden v. Saunders*, the power is, for wise purposes, prohibited to the respective states; but it is in terms given to the United States, and no doubt, because, being uniform over all the states, it would be more extensive in its operation, and of course more beneficial. The constitution could not grant in one clause, a power, the exercise of which is denounced as unjust in another.

Judgment for the defendants.

THE other case, of *Norris v. Breed*, was an action on a bill of exchange for £400, dated May 11, 1839, drawn by the defendants, and payable to the order of S. H. Norris, Esq.; and was submitted to the court upon a statement of facts similar to that in *May v. Breed*, but with this additional fact, that Norris proved his claim on this bill against the estate of the defendants in bankruptcy, and received two dividends from their assignees, one of two shillings in the pound, and the other of four pence.

S. E. Sewall, for the plaintiff.

Norris, by proving his debt and receiving a dividend, gave no assent to the discharge. The English bankrupt law does not contain the provision which our insolvent law does, discharging all debts proved. He did not prove voluntarily, but, as it were, by compulsion, to secure a fragment of his debt. It is true that the law undertakes to discharge all debts which

might have been proved under it. But it can have no extra-territorial operation; and the plaintiff's assent, if it exists, can amount only to a promise that he will not dispute the discharge in the English courts. He does not give any operation to the English law that it would not otherwise have. *Norton v. Cook*, 9 Conn. 314; *Hammett v. Anderson*, 3 Conn. 304; *Kimberly v. Ely*, 6 Pick. 440; *Agnew v. Platt*, 15 Pick. 417, 422; *Phillips v. Allan*, 8 B. & C. 477; *Bissell v. Briggs*, 9 Mass. 462; 10 Toullier Droit Civil, 121, 123. *Tebbetts's Case*, 5 Law Rep. 259, 265, was on a question of the construction of the United States bankrupt act. But this is not a question on the construction of a statute, but on a principle of international law.

C. G. Loring and *W. Dehon*, for the defendants.

The plaintiff, by proving his claim, and receiving a dividend, adopted the remedy provided by the law of the place of the contract, and applied it to the contract, so that it is satisfied and discharged. If he had by virtue of his residence here, any extraterritorial immunity, he has waived it, and has voluntarily become a party to the proceedings in bankruptcy, and has submitted himself and his contract to their jurisdiction. He cannot avail himself of the law for one purpose, and repudiate it for another. It would be a fraud on the other creditors, to go in and take a part of the funds from them, unless he takes it upon the same terms with them. *Phillips v. Allan*, 8 B. & C. 477; *Harrison v. Sterry*, 5 Cranch, 289, 299; *Woodhull v. Wagner*, Bald. 296, 301; *McMenomy v. Murray*, 3 Johns. Ch. 435, 440; *Clay v. Smith*, 3 Pet. 411; *Van Hook v. Whitlock*, 26 Wend. 43; *Chapman v. Forsyth*, 2 How. 202; *Cook v. Moffatt*, 5 How. 295, 299; *Morse v. Lowell*, 7 Met. 152; *Fisher v. Currier*, 7 Met. 424; *Gilbert v. Hebard*, 8 Met. 129, 132.

SHAW, C. J. The certificate of discharge, being held a good defence where the American creditor had not proved his debt, *a fortiori* is it so against a creditor who has proved his debt and taken dividends.

Webb v. Walker & another.

BENJAMIN F. WEBB v's. WILDES P. WALKER & another.

P., the purchaser of one half of a brig, gave W., the seller, his notes for a certain amount of the purchase money, and also a bond, reciting that said amount was to run on bottomry on the said half of the brig, and conditioned to pay the notes at maturity, and stipulating that P. should keep the half of the brig insured, and that, on P.'s failure to pay the notes, W. might sell said half at public auction for payment of the notes and expenses, accounting to P. for any surplus; and P., by the same instrument, appointed W. his attorney, to convey said half to the purchaser at such sale. It was held, that this instrument did not create an equitable lien upon the brig, nor declare a trust which could be enforced as against a subsequent purchaser from P., with or without notice.

THIS was a bill in equity, to enforce a supposed equitable lien or trust upon the brig *Caroline*, of Newcastle, Maine.

The bill stated that, on the 28th of April, 1846, the plaintiff, being the owner and in possession of one half of said brig, then lying in Boston, contracted to sell that half to one of the defendants, Elias D. Pierce, for the sum of \$4,000; for \$850 of which Pierce was to have a credit of six months, and for another like sum a credit of twelve months, Pierce securing said sums upon said one half of the brig, which was to be held in trust by Pierce for that purpose; that, on the same day, the plaintiff accordingly gave Pierce a bill of sale of the one half of the brig, and Pierce gave the plaintiff certain promissory notes, amounting in all to \$1,700, and payable at the times agreed upon, and also a certain instrument, the substance of which was stated in the bill, which instrument was as follows:

"Know all men by these presents, that I, Elias D. Pierce, of Boston, in the State of Massachusetts, merchant, am held and stand firmly bound unto Benjamin F. Webb, of Newcastle, in the State of Maine, his heirs, executors, and administrators, in the full and just sum of three thousand dollars, to the payment whereof, well and truly to be made, I hereby bind myself, my heirs, executors, and administrators, firmly by these presents.

"Now the condition of this obligation is such, that, whereas the said Benjamin F. Webb has advanced to the said Elias D. Pierce the sum of seventeen hundred dollars, which is to run on bottomry, on one half of the hull and appurtenances of the brig *Caroline*, of Newcastle, whereof said Pierce is the owner. And, whereas, the said Pierce has given his notes, bearing date the twenty eighth day of this present month, for the sum of eight hundred and fifty dollars, payable in six

Webb v. Walker & another.

months, and the further sum of eight hundred and fifty dollars, payable in twelve months, with interest after six months, to cover the said loan and interest agreed upon, it is hereby understood that if said notes are paid at maturity by the said Pierce, his heirs, executors, or administrators, then this bond is to become void, but otherwise to remain in full force.

"And it is further understood and agreed, that the said Pierce is to keep the said half of said brig insured at his own expense; and that, if he fails to pay his notes at maturity, as aforesaid, then it shall be lawful for the said Benjamin F. Webb to enter upon and take possession of said half of said brig, and the same to sell by public auction, duly advertised, for payment thereof, and of any and all charges he may incur in the premises, he accounting to said Pierce for any surplus which may come into his hands; and in case of sale so made, the said Benjamin F. Webb is hereby appointed the sufficient and lawful attorney of the said Pierce, to convey the said brig to any person who may become the purchaser.

"Witness my hand and seal, at Boston aforesaid, this twenty eighth day of April, in the year of our Lord eighteen hundred and forty six.

Witness, HENRY GYRELAAR."

ELIAS D. PIERCE. [SEAL.]

The bill then alleged, that the effect of the bill of sale from Webb to Pierce, and of the instrument given by Pierce to Webb, was to make Pierce the legal owner of the property, but in trust for Webb, and subject to a lien in favor of Webb, to the amount of \$1,700, until said trust and lien should be discharged by the payment of the money; that said instrument did not constitute a bottomry or respondentia bond, but did constitute a special trust: That, on the 30th of April, 1846, Pierce sold and conveyed his half of the brig to the other defendant, Walker; that Walker, before receiving a bill of sale thereof, and before the payment of any consideration therefor, had knowledge of the existence of the instrument above named, of the manner in which Pierce held the property, and of the plaintiff's claim thereon; and that Walker, therefore, took the property subject to a trust and lien in favor of the plaintiff.

The bill further stated, that the notes for \$850, payable in six months, had become due; that the plaintiff, on the day when they became due, demanded payment of Pierce, who failed to pay them; whereupon the plaintiff notified Walker thereof, and requested him to pay the notes, or to deliver or convey to him the half of the vessel, that he might enter upon and sell the same, according to the terms of the instrument; that Walker refused to do either, or to permit the

Webb v. Walker & another.

plaintiff to avail himself of his rights under said instrument, in any manner; and that no portion of the \$1,700 had been paid.

The prayer of the bill was, that Walker might be ordered to make such bill of sale, delivery, conveyance, or transfer of the property to the plaintiff, to enable him to enter upon and sell the same, according to the terms of said instrument, as to the court should seem meet. There was also a prayer for general relief; and a prayer that Walker might be enjoined against making any sale of the property until the trusts should be performed.

The defendant Pierce did not appear, and the bill was, by order of court, taken for confessed as to him.

The defendant Walker, in his answer, admitted most of the facts stated in the bill, but he denied that, at the time of the sale to him, he had notice of any trust or lien in favor of the complainant, or that he took the property subject to any such trust or lien; and he alleged that he paid Pierce \$4,000 for the one half of the brig, being the full value thereof. And he further denied that, if he had full knowledge at the time of his purchase, of the existence and contents of the instrument given by Pierce to the plaintiff, he should have taken the property subject to any trust in favor of the plaintiff, or that the said instrument could or did create any claim or lien in favor of the plaintiff.

The plaintiff filed a general replication.

After the note for \$850, payable in twelve months, fell due, the plaintiff filed a supplemental bill, stating the maturity of the note, and a demand of payment of Pierce, his refusal to pay, due notice thereof to Walker, a demand made of the latter to pay the same or deliver or convey the half of the brig to the complainant, and his refusal so to do, in the same manner as in the original bill. And the prayer was similar to that contained in the original bill.

Several depositions were taken by the plaintiff, to prove that Walker, at the time of his purchase, had notice of the trust or lien in favor of the plaintiff, the substance of which, and the objections to their competency, are not material to be stated.

 Webb v. Walker & another.

The case was argued at November term 1849.

C. G. Loring and *J. C. Dodge*, for the plaintiff.

The instrument given by Pierce to Webb is not a bottomry bond nor a mortgage, and constitutes no legal lien, sale, or pledge. No action will lie upon it at common law or in admiralty. But it does constitute an equitable lien or trust. *Lewin on Trusts*, 15, 76; *Homes v. Crane*, 2 Pick. 607, 610; 2 Story on Eq. §§ 715, 964, 1217 to 1224, 1231, 1251, 1257; *Legard v. Hodges*, 1 Ves. Jr. 477; *Collyer v. Fallon*, 1 Tur. & Rus. 459, 468; Ex parte *Atkins*, 2 Y. & Col. Exch. 536; *Yeates v. Groves*, 1 Ves. Jr. 280; *Fletcher v. Morey*, 2 Story, 555, 566; *Safford v. Rantoul*, 12 Pick. 233; *Clark v. Flint*, 22 Pick. 231; *Hunt v. Rousmanier*, 8 Wheat. 174. It was manifestly intended to be a bottomry bond; and as it cannot have effect as such, this court, sitting in equity, should give it effect in such other way as will best carry out the intentions of the parties.

C. B. Goodrich, for the defendant Walker, cited *Hunt v. Rousmanier*, 2 Mason, 342, and 8 Wheat. 174; Cross on Lien, 192; *Berrington v. Evans*, 3 Y. & Col. Exch. 384; *Collyer v. Fallon*, 1 Tur. & Rus. 459; *Winstow v. Merchants' Ins. Co.* 4 Met. 306, 316; *Legard v. Hodges*, 1 Ves. Jr. 478, note; *Dickenson v. Phillips*, 1 Barb. 454, 457; *Rogers v. Hosack*, 18 Wend. 319; *Busk v. Fearon*, 4 East, 319; Ex parte *Heywood*, 2 Rose, 355.

SHAW, C. J. The question for the court is, can this bill be maintained on the ground of trust, or otherwise. The question raised is an interesting one, and has received great consideration from the court.

The parties obviously intended to execute a bottomry bond; but this intention was not carried out. No marine interest was reserved. The vessel was not put at risk, nor did the security of the debt depend upon its safety alone; essential elements of such a bond. The instrument was simply an agreement, that the vendor of certain personal property might resell it upon non-payment of the purchase-money, and pay himself from the proceeds. Can the main intention of the parties be carried into effect notwithstanding this failure; and

did the instrument create such a lien, or declare such a trust, as can be enforced by a bill in equity? We think not. The stipulation to insure has no effect on the construction of the instrument. As the plaintiff was not to have the benefit of it, it was a clause entirely aside from the main body of the agreement. There are no words of grant, conveyance, pledge, or hypothecation. There is simply a stipulation, that, if one party failed to pay at the time fixed, the other might enter and sell, or might act as his attorney for the sale of the property. Pierce immediately sold to Walker, and when the first note became due, the plaintiff desired to sell, but Walker refused assent, and denied the existence of any vendible interest in Webb. It cannot be upheld as a mortgage, for there was no possession, and no record before the sale. It only gives a power to sell and apply the proceeds to the payment of the notes. This is not a power coupled with an interest, and amounting to an assignment. The vessel must be sold before any proceeds could arise, and it was only in the proceeds, when realized, that the plaintiff had any interest. Such an interest could not defeat Pierce's power to sell and pass the property. When a party has conveyed an interest in the thing itself, with a power to sell and appropriate the proceeds, the grantee takes something more than a naked, revocable power; but when only a power to sell is given, without any interest in the subject matter, except in the proceeds arising from the sale, which interest can only be obtained by execution of the authority, it is otherwise.

This case most resembles that of *Hunt v. Rousmanier*, 2 Mason, 342, 8 Wheaton, 174, and 3 Mason, 294. Rousmanier had borrowed money of Hunt, and by way of security gave him a power to sell two vessels, then at sea, and reimburse himself from the proceeds. Rousmanier died before the return of the vessels. Hunt brought his bill in equity, in the circuit court, to have a lien on the vessels declared in his favor, to have the vessels sold, and his debt first paid out of the proceeds. The estate of Rousmanier was insolvent, and the question was between the complainant, relying upon such trust, and the general creditors. Upon a demurrer, judgment

Webb v. Walker & another.

was given for the defendant, on the ground that the power was a naked power, not coupled with an interest in the vessels, and that it terminated with the death of the party who gave it.

On error to the supreme court of the United States, the cause was argued at great length; and, in an opinion given by Marshall, C. J., the court affirmed both the above propositions, namely, first, that a power to sell a vessel and take payment from the proceeds, was a naked power, not coupled with an interest, and so created no assignment; and, second, that, as a naked power, it ceased with the death of the party who gave it; that it created no trust and no assignment, and of course no lien on the vessels. But as that case came up on a demurrer, and it appeared to be stated by the bill, that the agreement was intended to operate as an effectual security for those loans on those vessels; that both parties so intended; and that the powers were therefore given and taken under a mistake; and as that court had jurisdiction in equity to correct a mistake, they reversed the decree of the circuit court, sustaining the demurrer, and remanded the case to the circuit court, with leave to the defendants to withdraw the demurrer and file an answer. The case came again before the circuit court, on the answer and proofs; and it was decided by Story, J., that no such mistake was established, and judgment was given for the defendants.

To the only points applicable to this case, the foregoing is an authority for the defendant, and decides that such a power of attorney, given by an owner, though intended as a security for money, constitutes no assignment, no contract for specific performance, and no trust; and therefore will not sustain a bill in equity in this court.

But it is clear that this court has no jurisdiction in equity to afford relief in cases of mistake, even if a mistake in matter of law merely, where the parties have given and taken the security which they intended, but did it under a mistake of the law, as to its effect and operation, were a proper ground of relief in a court of full equity jurisdiction.

In the present case the parties no doubt intended to give

Webb v. Walker & another.

and receive a bottomry bond, which, if it had been done, would have been a marine contract, giving jurisdiction to the court of admiralty, by process *in rem*, to afford relief; but being made, as conceded, without the requisites of a bottomry bond, it could not be thus enforced.

It is not a mortgage, because there were no words of absolute or conditional transfer, no delivery or record; nor an assignment, because no interest in the property to be sold was coupled with the power to sell; nor a pledge or hypothecation, because attended by no delivery or change of possession. The only remaining question is, whether it was a declaration of trust. As already stated, the court are of opinion that it was not. It was no more a declaration of trust, binding on third parties, than would be constituted by an agreement of mortgage, pledge, or hypothecation, without delivery, and without change of possession; it might be good against the original party, if he for whose benefit it was made could get peaceable possession; *Bartlett v. Williams*, 1 Pick. 288; but could not affect a subsequent purchaser or creditor.

It may be proper to remark, that this power to sell is distinguishable from that class of powers given by wills, which, from the nature of the case, are held to be not revocable by death; and from trust powers derived out of a will; as powers to sell an estate in trust to pay over the proceeds; which must, *ex necessitate*, be executed after death. But this power was given by a mere executory stipulation, *inter vivos*, and was therefore revocable.

Our opinion upon this point renders it unnecessary to go into the discussion of the question, whether Walker purchased with notice, upon which considerable evidence was taken.

Bill dismissed, with costs for the defendant.

COMMONWEALTH vs. CYRUS ALGER.

By the colony ordinance of 1647, commonly known as the ordinance of 1641, the proprietors of upland bounding on the sea have an estate in fee in the adjoining flats above low water mark and within one hundred rods of the upland, with full power to erect wharves and other buildings thereon; subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation; and subject, also, to such restraints and limitations of the proprietors' use of them, as the legislature may see fit to impose for the preservation and protection of public and private rights.

The legislature of this commonwealth has power to establish lines in the harbor of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf, extended or maintained beyond such lines, a public nuisance; and statutes establishing such lines take away the right of the proprietors of flats in the harbor beyond the lines to build wharves thereon, even when they would be no actual injury to navigation; and such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public uses without compensation, within the meaning of the Declaration of Rights, art. 10; nor as impairing the obligation of the grant made by the colony ordinance, and thus transgressing the prohibition of the constitution of the United States, art. 1, § 10, against passing laws impairing the obligation of contracts. But such statutes do not affect the right to maintain wharves erected before their passage.

THIS was an indictment against the defendant for an alleged breach of the statutes of this commonwealth establishing the commissioners' lines, so called, in the harbor of Boston, by erecting, building, and maintaining a wharf over and beyond those lines into said harbor.

The indictment was found and returned into the municipal court of the city of Boston at June term, 1849. It set forth the following statutes for fixing and limiting the lines of the harbor of Boston: "An act to preserve the harbor of Boston, and to prevent encroachments therein," passed April 19, 1837, (*St.* 1837, c. 229, 7 Special Laws, 808); "An act concerning the harbor of Boston," passed March 17, 1840, (*St.* 1840, c. 35, 8 Special Laws, 157); "An act in addition to an act concerning the harbor of Boston," passed March 6, 1841, (*St.* 1841, c. 60, 8 Special Laws, 204); and "An act concerning lines in Boston harbor," passed April 26, 1847, (*St.* 1847, c. 278, 8 Special Laws, 836); and also certain resolves passed

May 10, 1848, (Resolves of 1848, c. 76,) entitled "Resolves relating to encroachments in Boston harbor," directing the attorneys of the commonwealth for the county of Suffolk, and for the northern district, to prosecute all violations of these acts.

The first and second sections of the act of 1837, c. 229, established a line by local objects designated from the lower South Boston Free Bridge, around the easterly and northerly sides of the city, to the abutment on the Boston side of Warren Bridge, above Charles River Bridge. The third, fourth, fifth and sixth sections of this act were as follows:

"SECTION 3. No wharf, pier or building, or incumbrance of any kind, shall ever hereafter be extended beyond the said line into or over the tide water in said harbor.

"SECTION 4. No person shall enlarge or extend any wharf or pier, which is now erected on the inner side of said line, further towards the said line than such wharf or pier now stands, or than the same might have been lawfully enlarged or extended before the passing of this act, without leave first obtained from the legislature.

"SECTION 5. No person shall in any other part of the said harbor of Boston, belonging to the commonwealth, erect or cause to be erected any wharf or pier, or begin to erect any wharf or pier therein, or place any stones, wood or other materials in said harbor, or dig down or remove any of the land covered with water at low tide, in said harbor, with intent to erect any wharf or pier therein, or to enlarge or extend any wharf or pier now erected: *provided, however*, that nothing herein contained shall be construed to restrain or control the lawful rights of the owners of any lands or flats in said harbor.

"SECTION 6. Every person offending against the provisions of this act, shall be deemed guilty of a misdemeanor, and shall be liable to be prosecuted therefor, by indictment or information, in any court of competent jurisdiction, and on conviction shall be punished by a fine not less than one thousand dollars, nor more than five thousand dollars, for every offence, and any erection or obstruction which shall be made, contrary to the provisions and intent of this act, shall be liable to be removed and abated as a public nuisance, in the manner heretofore provided for the removal and abatement of nuisances on public highways."

The first section of the act of 1840, c. 35, declared that the lines described in that act were thereby established as the lines of the channel of the harbor of Boston, beyond which no wharf or pier should ever thereafter be extended into and over the tide water of the commonwealth. The second section described the lines by local objects designated between the South Boston Free Bridge and the old South Boston Bridge, on each side of the channel, and also somewhat easterly of the lower bridge on the South Boston side. The third section

Commonwealth v. Alger.

described the line from the Warren Bridge to the Boston and Roxbury Mill Dam, on the Boston side of the channel; the fourth section, the line on the Charlestown side of the harbor; and the fifth section, the line on the East Boston side of the harbor.

The act of 1841, *c.* 60, altered part of the line established by the act of 1840, *c.* 35, § 3, between the West Boston Bridge and the Boston and Roxbury Mill Dam.

The act of 1847, *c.* 278, established additional lines therein described. The second section described the lines of the Cambridge side of the channel of Charles River. The third section described the lines in Miller's River between Cambridge and Charlestown. The fourth section described the lines in South Bay, one of which, "drawn from a point on the south side of the south free bridge, (one hundred and fifty feet south-easterly of the south-easterly side of the draw,) in a southerly direction, parallel to the Dorchester turnpike, three thousand feet," was the line immediately affecting this case.

The acts of 1840, *c.* 35, §§ 6, 7, and 1847, *c.* 278, §§ 5, 6, contained provisions similar to the act of 1837, *c.* 229, §§ 3, 4, 5, 6, except that they contained no proviso, saving the rights of owners of land or flats in the harbor.

The indictment then averred that all the parts of the harbor of Boston, outside of and beyond the commissioners' lines, and between those lines and the high sea, were, and from the time whereof the memory of man was not to the contrary, an ancient, navigable harbor, and an ancient and common highway for all citizens of the commonwealth with their ships, vessels, lighters, gondolas, and boats, to navigate, sail, propel, row, pass, repass, and labor, at their will and pleasure: That the defendant unlawfully erected, built, and established in said harbor and highway, and extended beyond said lines, and into and over the tide water of the commonwealth, a certain superstructure, obstruction, and encumbrance, consisting of stones, timbers, piles, and earth, and made into the form and substance of a wharf or pier, of the height of ten feet, and of the form of a triangle, superficial measure, measuring on the southerly side thereof, towards the sea and south bay,

the length of forty two feet and nine inches, and on the westerly side thereof, upon the said harbor and highway, the breadth of one hundred and twenty feet and four inches, and on the easterly side thereof, bounding on the wharf and flats of the defendant, one hundred and twenty seven feet and two inches; and unlawfully continued and maintained the said wharf or pier; by means whereof the navigation and free passage of, in and over said harbor and highway had been and were greatly obstructed, limited, and encumbered, so that the citizens of the commonwealth navigating, &c., in, over, and upon said harbor, with their ships, &c., could not navigate there, upon their lawful business, and at their will and pleasure, in so free and uninterrupted a manner as of right they ought, and had before been accustomed to do; to the great damage of all the citizens of the commonwealth there navigating, &c., to the great obstruction of the navigation of, upon, and over said highway and harbor and tide water, against the peace of the commonwealth, and contrary to the forms of the statutes in such case made and provided.

At the trial in the municipal court before *Wells*, C. J., at September term, 1849, the attorney for the commonwealth put in evidence a statement agreed to and signed by himself and the defendant, exhibiting the following facts: The defendant is, and for more than thirty years past has been, seised of an estate on Fourth Street in South Boston, consisting of upland and of flats belonging thereto, just above the old South Boston Bridge, and bounding on that arm of the sea, lying between Boston proper and South Boston, in and through which the sea ebbs and flows to and from a bay above, called South Bay. In 1843, he began to build a wharf on his said flats, and constructed the northerly wall thereof from his upland nearly to the channel, and then filled in and constructed said wharf, but did not complete it until the commissioners' line of 1847 had been established, after which he built the triangular piece set forth in the indictment, which forms a part of the wharf as originally commenced by him. This triangular piece is beyond said line, but is built on the defendant's own flats; it is not one hundred rods from the upland, is not below

low water mark, is no injury to navigation, and is not so far beyond the commissioners' line or so near the channel as the northerly wall of the wharf was built in 1843.

No other evidence was offered.

The defendant contended and requested the judge to rule and instruct the jury that the evidence offered did not sustain the indictment, and that the defendant, upon these facts, was entitled to a verdict. But the judge refused so to rule, and instructed the jury that on the evidence introduced, if believed, the government were entitled to a verdict. Whereupon the jury returned a verdict of guilty; and the presiding judge, being of opinion that the questions of law arising in the case were so doubtful and important as to require the decision of this court, with the consent of the defendant, reported the case for the purpose of presenting those questions.

The case was argued at March term, 1850.

S. D. Parker, county attorney, for the commonwealth. The acts passed by the legislature to preserve the harbor of Boston, are constitutional and valid. The commonwealth has sovereign dominion, jurisdiction, and ownership over the sea-shore. Such rights are recognized by the law of nature and of nations, the Roman law, the common law of England, and the statutes and judicial decisions of Massachusetts. See *Taylor's Civil Law*, (3d ed.) 471, 472; *Angell on Tide Waters*, (2d ed.) 20, 37; *Attorney General v. Richards*, 2 Anstr. 603; *Bennett v. Boggs*, Bald. 60; *New Orleans v. United States*, 10 Pet. 662; *Pollard v. Hagan*, 3 How. 212. The sovereign may abate every intrusion on the sea-shore, whether the same be a nuisance to navigation or not. *Angell on Tide-Waters*, (2d ed.) 198, 200; *Hale de Jure Maris*, in 1 *Hargrave's Law Tracts*, 85; *Attorney General v. Richards*, 2 Anstr. 603, 606; *Attorney General v. Johnson*, 2 Wils. Ch. 87, 101; *The King v. Tindall*, 6 Ad. & El. 143; *Commonwealth v. Wright*, Thach. Cr. Ca. 211, and 3 Am. Jur. 185; *Respublica v. Caldwell*, 1 Dall. 150; 2 Story on Eq. §§ 920, & seq. In the Massachusetts colony ordinance of 1641, the right of navigation is expressly reserved. And see *Parker v. Cutler Milldam Co.* 7 Shep. 353, 357; *Sale v. Pratt*, 19 Pick. 191; *Storer v. Freeman*,

6 Mass. 435; *Commonwealth v. Charlestown*, 1 Pick. 180; *Barber v. Bates*, 13 Pick. 255; *Austin v. Carter*, 1 Mass. 231; 2 Dane Ab. 700. The legislature have express authority by the constitution to pass all manner of wholesome and reasonable laws for the public good; Const. of Mass. part 2, c. I. § 1, art. 4; and the preservation of the harbor of Boston is a matter of great public interest.

These statutes do not take private property for public uses, without making compensation, within the meaning of the Declaration of Rights, art. 10. They do not deprive the defendant of his property; they only restrain him from using it in a particular way. The legislature say to the defendant: "You may dig shell-fish, but you shall not build wharves." It is an exercise of part of the power to make police regulations, fully recognized by this court, in *Commonwealth v. Tewksbury*, 11 Met. 55.

B. R. Curtis and *C. A. Welch*, for the defendant. The defendant does not contend that the act in question is void, but that it is inoperative as against him, because it would impair the obligation of the contract contained in the grant, under which he holds these flats.

Certain positions are clear: (1.) The defendant holds these flats by a lawful seisin in fee simple, under a grant from the colony, made by the ordinance of 1641. (2.) A grant is an executed contract, and every right embraced in the grant, is protected by that clause in the constitution of the United States, which prohibits any state from passing any law impairing the obligation of a contract. Const. U. S. art. 1, § 10; *Fletcher v. Peck*, 6 Cranch, 87; *Terrett v. Taylor*, 9 Cranch, 43, 50; *Green v. Biddle*, 8 Wheat. 1; *Wilkinson v. Leland*, 2 Pet. 627, 657; *Rehoboth v. Hunt*, 1 Pick. 224; *Pike v. Dyke*, 2 Greenl. 213. This provision of the constitution extends not only to the soil, but also to every incidental right essential to its enjoyment. *People v. Platt*, 17 Johns. 195, 215. (3.) Grants made before the constitution was adopted, are protected by it. *Dartmouth College v. Woodward*, 4 Wheat. 518.

These defendants then holding under a grant from the

colony, and every right embraced in that grant being protected, this question arises: Are the prohibitions contained in this statute consistent with every right embraced in the grant? The prohibitions are against placing any wharf, pier, building, or encumbrance of any kind, at any time, on this land. To determine whether these prohibitions are consistent with every right embraced in the grant, we must look at the nature of the thing granted. It is land, granted in fee; but it is land of a peculiar kind, twice in twenty four hours covered by the tide, not susceptible of any cultivation, yielding no products, not susceptible of being enjoyed as land in fee, but by placing upon it some wharf, pier, building, or other encumbrance. As to the right of digging shell-fish, alluded to by the attorney for the commonwealth, that has been recently decided by this court to be a public right. *Weston v. Sampson*, Plymouth, October term, 1849, not yet reported. It has been judicially determined that the object of the grant of the flats, was to enable the grantee to build wharves and piers thereon. *Storer v. Freeman*, 6 Mass. 435, 438; *Sparhawk v. Bullard*, 1 Met. 95, 108. He who grants a thing, grants impliedly all that is necessary to the enjoyment of that thing; and this principle extends to grants made by the law. Co. Lit. 56, a; *Darcy v. Askwith*, Hobart, 234; *Saunders's Case*, 5 Co. 12; *Liford's Case*, 11 Co. 46, 50; 1 Wms. Saund. 323, note (6.) The word "propriety," of itself, is enough to show how broad the grant was; and the right to build wharves is granted by clear implication. The prohibitions contained in the statute of 1847 are therefore inconsistent with the rights embraced in the grant.

But it is said that the object of this prohibition is to protect the harbor of Boston, that the navigability of the harbor is a public right, and that the state has power to preserve it, by restraining private owners from building into it, beyond the prescribed line. Certainly the state has this power, but if the exercise of it interfere with any vested rights embraced in the grant, the state must make compensation. The state cannot interfere with vested rights, for the purpose of protecting the harbor or any other public interest, without compensation.

Stevens v. Middlesex Canal, 12 Mass. 466, 468; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166; *People v. Platt*, 17 Johns. 195, 215; *Crenshaw v. Slate River Co.* 6 Rand. 245; *Perry v. Wilson*, 7 Mass. 393; *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. 467, 482; *Hooker v. New Haven and Northampton Co.* 14 Conn. 146; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 507.

It is intimated that in the grant there was excepted and reserved to the public, the right to prohibit the erection of a wharf thereon, if the benefit of the harbor should require such prohibition. But even an express exception, made by apt words, is void, if it extends to the whole substance of what is granted. 1 Plowd. 153; Co. Lit. 47 a; *Dorrell v. Collins*, Cro. Eliz. 6; Shep. Touchst. 78; and no exception is ever implied; Shep. Touchst. 78. The exception in the ordinance is: "provided, that the proprietor shall not have power to stop or hinder the passage of boats or other vessels, to other men's houses or lands." Applying the two rules above stated, this exception clearly means only that such a passage shall be preserved, not that no erection shall be made, which on a nice scientific calculation shall be thought to affect the harbor. Although "the proprietor of flats can lawfully erect nothing upon them, which will obstruct or hinder such passage," "he may build wharves extending towards the sea to the distance of one hundred rods, provided he do not thereby straiten or interrupt the passage over the water, in such manner as to constitute a public nuisance." By Parker, C. J., *Commonwealth v. Charlestown*, 1 Pick. 180, 184. And see *Austin v. Carter*, 1 Mass. 231; *Commonwealth v. Crowninshield*, 2 Dane Ab. 697.

There is, however, a class of cases, in which it has been held that the legislature might restrain owners of land from making certain uses of their property, and might authorize acts which caused damage to property, without making compensation. But these cases do not depend upon any power reserved to the public, to do any thing in conflict with the grant, or in derogation of any right acquired by the grant; but each case turns on the question, whether the particular

thing done or prohibited was a violation of any right acquired by the grant. This is a very important distinction.

In *Hollister v. Union Company*, 9 Conn. 436, commented on and explained in *Hooker v. New Haven & Northampton Company*, 14 Conn. 146, 160, the question was only, whether the plaintiff had, by the grant of a right of way, any right to be secured against the effects of improvements in navigation. If he had, he could have recovered. See *Henly v. Lyme*, 5 Bing. 91. The case in 9 Conn. rests on the principle recognized in *Callender v. Marsh*, 1 Pick. 418, 431. It does not depend on the public nature of the encroaching right; the principle would be the same, if that right were private. *Thurston v. Hancock*, 12 Mass. 220; *Callender v. Marsh*, 1 Pick. 418, 434; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & El. 493; *Partridge v. Scott*, 3 M. & W. 220; *Lasala v. Holbrook*, 4 Paige, 169. In all these cases, the only question was, whether any right of the plaintiff was infringed; and it was held there was not, because the defendant was doing on his own soil, or by virtue of his right of way, what he had previously acquired a lawful title to do. They have no tendency to show that there was reserved to the public the right to prohibit the plaintiff from making that use of his own soil, which he had, by grant from the government, a lawful right to make. That is a very different question, for there a vested right is infringed. See *Stackpole v. Healy*, 16 Mass. 33, 37.

Lansing v. Smith, 8 Cow. 146, only went to the extent of holding, that the public might regulate the right of navigation by authorizing erections on the land retained by them at the time of the grant to the plaintiff, although, by so doing, they incidentally interfered with the access to the land so granted; not that they might prohibit him from building a wharf on the grant. In *Vanderbilt v. Adams*, 7 Cow. 349, 351, a statute authorizing the harbor-masters to regulate the position of vessels in certain waters, was held valid as a police regulation.

In *Baker v. Boston*, 12 Pick. 184, it was held that, by the action of the mayor and aldermen, the plaintiff's creek had been adjudged to be a nuisance; and as there could be no such thing as a right to make a nuisance, that therefore the

plaintiff could not recover. But this case is not a case of nuisance. It appears from the facts agreed that the defendant's wharf does not interfere with any public rights. The statutes on which this indictment is founded, do not go on the ground of a nuisance. The only object apparent in them is, to establish the lines of the channel, and prevent encroachments thereon. The proviso in the act of 1837, c. 229, § 5, shows that the legislature had then no intention to interfere with private rights; and the subsequent acts only carry out the policy of the first, and, being *in pari materia*, are to be construed as if that proviso had been inserted in them.

The case of *Coates v. New York*, 7 Cow. 585, 604, 605, goes further than any other. There, the plaintiffs held a grant from King William III. of land for a churchyard, and had always used it as such; but the court held, that a by-law passed by the mayor and aldermen of New York, under the authority conferred on them by statute, prohibiting burials in certain parts of the city, was not unconstitutional as applied to the plaintiffs. There may, perhaps be a sound distinction between a grant from the crown and one made by legislative authority; for the king could make no grant which would affect future legislatures. And this decision may stand on the power to prohibit a particular use, which has become a nuisance, if the grant from the public does not authorize that use. But this is a police power, to prohibit a particular use, and not every use of which the land is capable; a power to regulate, and not a power to destroy. And this cannot be done if the grant from the public, either expressly or by a necessary implication, authorizes that particular use. *People v. Platt*, 17 Johns. 195; *Washington Bridge Company v. The State*, 18 Conn. 53. In such a case, compensation must be made.

Tewksbury's case, 11 Met. 55, falls easily within the principles contended for. He owned the land, but he took it subject to all servitudes incident to the nature of the property, among others, to this restriction, that he should not dig away the soil or remove the stones, so as to cause or permit the water to do injury to any one. This did not depend on any exception out of the grant in favor of the public. If the land of

any private owner on the other side of the beach had been injured, he could have brought an action for the damages so occasioned.

The maxim, *sic utere tuo ut alienum non laedas*, does not apply to this case. The defendant's wharf interferes with no private rights; and how can it be said to interfere with the rights of the commonwealth, who have granted him the land for the very purpose of building a wharf upon?

Lastly, if there is any doubt in this case, the court ought to lean in favor of private rights. The general rule is in favor of upholding a law; but where the question is not whether the statute is valid, but whether it shall operate on a particular case, the leaning should be in favor of private rights; for it is not to be presumed that the legislature intended to infringe on private rights. See *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166; *People v. Platt*, 17 Johns. 194, 214.

We do not doubt the power of the legislature to establish this line, or that this may be a proper case for such a line; but it must be done, if done at all, as an exercise of the right of eminent domain, and compensation made.

Parker, in reply. These statutes are not unconstitutional, as impairing the obligation of a contract. It is very questionable whether the colonial ordinance is in force now, *proprio vigore*. In many of the cases cited, it is spoken of rather as common law than as statute law. And it cannot be doubted, that the legislature have the power to amend the common law on any subject.

The old colony ordinance is not a grant. If every law beneficial to the subject could be treated as a contract or grant, no law could be repealed without the consent of all the citizens; or, if the voice and act of the legislature be evidence of the consent of all the citizens, then these acts are constitutional, as being founded on the consent of all parties. Most, if not all, of the cases on which the defendant relies, were cases of special statutes, and therefore do not apply to this case. If a general law constituted a grant, the legislature could not modify or repeal the license laws, the usury laws, or the banking laws. The principle contended for by the defend-

ant would deprive the legislature of most of its power to make police laws.

All property is held under some conditions, among which are, that it is not to be used to another man's injury, and that the legislature may impose restrictions for the public good. Besides; the supposed grant contains a proviso, that the passage of boats or vessels to other men's houses or lands shall not be stopped or hindered. If the filling up of the defendant's wharf will have a tendency to make the harbor shallower, and stop up its channels so that, at some future time, other men will not be able to pass to their lands, it comes within the very spirit of the proviso.

The opinion was delivered at March term, 1853.

SHAW, C. J. In proceeding to give judgment in the present case, the court are deeply impressed with the importance of the principles which it involves, and the magnitude and extent of the great public interests, and the importance and value of the private rights, directly or indirectly to be affected by it. It affects the relative rights of the public and of individual proprietors, in the soil lying on tide waters, between high and low water mark, over which the sea ebbs and flows, in the ordinary action of the tides.

The defendant has been indicted for having erected and built a wharf over and beyond certain lines, described as the commissioners' lines, into the harbor of Boston. The case comes before this court, upon a report of the judge of the municipal court, who, deeming the questions of law involved in the case doubtful and important, with the consent of the defendant, pursuant to the statute, reported the same for the consideration of this court. Probably the opinion was given *pro forma*, and a verdict taken by consent, with a view to present the whole question to this court.

The case thus presented, must depend on the construction, validity, and effect of the laws in question, establishing the lines of the harbor, as they affect public and private rights; regarding, as they do, the rights of the public in tide waters and the arms of the sea, and the nature, extent, and limits of the rights of private proprietors in flats and sea-shores.

The uncontested facts in the present case are, that the defendant was owner of land, bounded on a cove or arm of the sea, in which the tide ebbed and flowed, that he built the wharf complained of, on the flats before his said land, between high and low water mark, and within one hundred rods of his upland, but below the commissioners' line as fixed by one of these statutes; although it was so built as not to obstruct or impede navigation. This certainly presents the case most favorably for the defendant.

We may, perhaps, better embrace the several subjects involved in the inquiry, by considering,

First, What are the rights of owners of land, bounding on salt water, whom it is convenient to designate as riparian proprietors, to the flats over which the tide ebbs and flows, as such rights are settled and established by the laws of Massachusetts; and,

Second, What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of these rights.

I. By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water mark, was in the king, as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation. These uses were held to be public, not only for all the king's subjects, but for foreigners, being subjects of states at peace with England, and coming to the ports and havens of England, with their ships and vessels for the purposes of trade and commerce.

The charter under which the colony was formed and settled—first, that of James I. to the Plymouth company, and subsequently that of Charles I. in 1628, reciting an assignment of part of the territory formerly granted to the Plymouth company, being all that part of said territory, which after-

wards constituted the colony of Massachusetts, to Sir Henry Roswell and his associates — did proceed to grant and confirm to Sir Henry Roswell and his associates all the said lands described, and every part and parcel thereof, and all the islands, rivers, ports, havens, waters, fishings, fishes, mines, minerals, jurisdictions, franchises, royalties, liberties, privileges, commodities, and premises whatsoever, with the appurtenances.

This charter was not merely a grant of property within the realm of England, but it contained provisions for the establishment of a separate dependent government under the allegiance of the king; and the government thereby constituted was invested with all the requisite civil and political powers to enable it to establish and govern the colony, and to make laws for that purpose, not repugnant to the laws of England. It was so understood and practised upon, and a species of representative government was soon ingrafted on it in practice, and so it continued, and the colony grew up and flourished under it, until the charter was formally revoked and annulled, by a decree of the English court of chancery, in 1685. This decree we may have occasion to allude to again hereafter. At present it is not necessary to trace the powers of the colonial government further. They were then regarded and have ever since been acknowledged to be ample and sufficient to grant and establish titles to land and to all territorial rights and privileges, and to govern and control all the internal concerns of the territory over which it was established. To the grants and acts of that government all titles to real property in Massachusetts, with their incidents and qualifications, are to be traced as their source.

Assuming that by the common law of England, as above stated, the right of riparian proprietors, bounding upon tide waters, extending to high water mark only, and assuming that the first settlers of Massachusetts regarded the law of England as their law, and governed themselves by it, it follows that the earliest grants of land bounding on tide waters would be to the high water line and not below it, and would have so remained, but for the colony ordinance, now to be considered.

This is commonly denominated the ordinance of 1641; but this date is probably a mistake. It is found in the Ancient Charters, 148, in connection with another on free fishing and fowling, and marked 1641, 47. That on free fishing, &c., is taken in terms from the "Body of Liberties," adopted and passed in 1641, leaving the date 1647 to apply to the other subject respecting ownership in coves, &c., about salt water. See an interesting work, *Remarks on the Early Laws of Massachusetts Bay*, by Francis C. Gray. 8 Mass. Hist. Soc. Coll. (3d series) 191, 215. This work contains, probably for the first time in print, a full copy of the "Body of Liberties," which, there is evidence to believe, were adopted and sanctioned by the colonial government in 1641, but were never printed entire with the colony laws, although many of them were embodied in terms in particular ordinances. But the date is quite immaterial, and the only purpose of making this explanation is to show why these two subjects, separate in their origin, were so connected together in the publication of the colony laws, that it seems necessary now to consider them together as one act.

The whole article, as it stands in the Ancient Charters and in the edition of the colony laws of 1660, is as follows:

"SECT. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them: provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

"The which clearly to determine; SECT. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor

shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

"SECT. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. [1641, 47.]"

In analyzing this ordinance, which thus appears as one act, it appears that that part of it which relates to free fishing and fowling in all great ponds, and in creeks, coves, and rivers, where the sea ebbs and flows, was taken word for word from the "Body of Liberties," § 16, but no mention is made in that collection, of the rights of proprietors to low water mark. The latter provision, together with one declaring what should be deemed great ponds, was probably passed afterwards, in 1647. The subjects being connected together would, according to the usage of the time, be connected together as one article in the subsequent editions of the laws; and this consideration shows the relation of these subjects to each other, and the fitness of connecting them together when published, for the information of the colonists.

The great purpose of the 16th article of the "Body of Liberties" was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free. It expressly extended this right to places in which the tide ebbs and flows, then public domain, open to all. But when there afterwards came a provision, in effect declaring this territory, between high and low water mark, the private property of the riparian proprietor or owner of the upland; this would seem to take away or abridge the right to the use of the shores, previously given; but this was accompanied by another, that, for fowling and fishing, persons may pass over another man's property, of course including these shores thus made private property; this restores the public right to pass on foot over flats or places over which the sea ebbs and flows, so long as they are not actually reclaimed and converted into tillage or mowing land.

Such being the terms of the colony ordinance, and such the state and condition of the law when it was passed, and taking into consideration the condition and circumstances of the colony at the early period at which it was adopted, the material question is, what was its legal effect and operation?

In construing this ordinance heretofore, and applying it to particular cases, courts have frequently had occasion to remark upon the difficulties and embarrassments attending its construction. But these have referred mainly, not to the question, what estate the riparian proprietor takes in flats acknowledged to belong to his upland, but to difficulties in determining, from the generality of the terms of the ordinance, and peculiar local circumstances, what particular flats do belong to any particular parcel of upland, arising from the line and conformation of the shore on which they lie, whether straight or curved, whether curved inward or outward, direct or having points or promontories, or broad or narrow indentations, or arising from the formation of the flats over which the sea ebbs and flows, the direction of the current, and the relative position of the flats to the channel or deep water, beyond which the sea doth not ebb. *Adams v. Frothingham*, 3 Mass. 352; *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Valentine v. Piper*, 22 Pick. 85; *Sparhawk v. Bullard*, 1 Met. 95; *Piper v. Richardson*, 9 Met. 155; *Walker v. Boston & Maine Railroad*, 3 Cush. 1, 22; *Gray v. Deluce*, 5 Cush. 9, 12. These are some of the principal cases in which these difficulties, which are intrinsic and unavoidable, have been alluded to; and they all arose, so far as this point was concerned, in applying the rule to particular cases, in order to ascertain whether the flats in controversy did or did not belong to the particular parcel of upland for which they were claimed. We mention them for the purpose of laying them out of the case, as having no bearing upon the present question.

Taking the terms of the ordinance, with a long course of judicial decisions upon its construction, nearly if not quite uniform, the court are of opinion that the antecedent law limiting the right of private proprietors of land bounding on

the sea or salt water, to the line of high water, was changed by it; that, after this ordinance, the grant of lands, so situated, by the colonial government to individuals, or to proprietors of townships or companies of settlers, through whom they came to individuals, vested in such grantees an estate in fee in the land lying between high and low water mark, subject to the restriction expressed in the proviso, "so as not to stop or hinder the passage of boats and vessels," &c., and subject to all such restraints and limitations of absolute dominion over it, in its use and appropriation, as other real estate is subject to, for the security and benefit of other proprietors, and of the public, in the enjoyment of their rights.

Before proceeding to state these limitations and exceptions, and for the better understanding of them, it may be useful to state the grounds of our opinion in regard to the rule itself. The language of the ordinance, though quaint and peculiar, as might be expected in so ancient a document, seems yet to be clear and intelligible. The word "propriety" is nearly, if not precisely, equivalent to "property." It imports not an easement, an incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest. A suggestion has somewhere been made, founded on the use of the word "liberty" in the proviso—"provided, that such proprietor shall not by this *liberty* have power to stop or hinder the passage of boats," &c.—and thence drawing an inference, that the whole ordinance was intended to confer only a license or permission, liable to be revoked or withdrawn by the power which conferred it. But it is manifest that the word was not so used in this proviso. The term "liberties" was used as synonymous with laws, or legal rights founded and established by law. In the published edition of the colony ordinances, generally, they are denominated the Laws and Liberties. The code already alluded to as having been accepted and adopted in 1641, was called the "Body of Liberties." It is said by Hutchinson, that they were composed by Rev. Nathaniel Ward, of Ipswich, who, he adds, had been a minister in England, and formerly a student

and practiser in the course of the common law. 2 Winthrop's Journal, 55. They bear intrinsic evidence of having been drawn with great skill and legal accuracy, and have a constant reference to the established principles of the laws of England. Yet they were called Liberties. Perhaps this was advisedly done, because the colonial government were acting under a charter which made them a corporation; and although it conferred on the governor and company large powers to govern the settlement which they might establish, yet it was always so as "not to be repugnant to the laws of England." It might seem to them less arrogant to set forth and declare their "liberties" and rights in this form, than to enact in terms a body of laws, which might seem to indicate a disregard of the authority of the mother country. This use of the term "liberty," as synonymous with right, franchise, and privilege, is strictly conformable to the sense of the term as used in *Magna Charta*, in the Declaration of Rights, and in English statutes, grants, and legal instruments. Jacob's Law Dict. Tit. Liberty.

But, however this may be, we think it manifest, from the whole tenor of their legislation, that when the early settlers of Massachusetts, holding their lands under the freest and most liberal English tenure, that of tenants in fee simple in free and common socage, were making provision for granting and taking titles to real estate for themselves and their posterity, and when a certain valuable right and interest was annexed to and made part of such grants of estate by the government competent to impress such character upon it, they understood, both those who made and those who proceeded to take titles and settle the country under such grants, that the grantees acquired a legal right and vested interest in the soil, and not a mere permissive indulgence, or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it.

We think this is confirmed by the use of the word "propriety," as used in two other places in the same ordinance. In the section immediately preceding the provision respecting flats, "no man shall come upon another's *propriety* without

their leave," &c., clearly meaning land. So, in a succeeding section, "may pass and repass on foot through any man's *propriety*, so they trespass not on any man's corn or meadow." Here it obviously means his real estate, his farm, including its most valuable part, his tillage and mowing lands. The word "*propriety*" is used in the same sense by Lord Hale, and many other writers of that period, and is obviously a translation of the Latin word "*proprietas*," Latin being the language then chiefly used in legal writings and proceedings. Yet it is the term "*propriety*," in the enacting clause, which is called "this liberty" in the proviso. We think it is therefore impossible, from this casual use of the word liberty in the proviso, to infer that it was intended to give a gratuitous permission or license to the riparian proprietor to make a temporary or casual use of the flats adjoining his upland; and we think it was intended to declare a general rule of property, in regard to all real estate, bounded upon tide waters, annexing a new and additional right of soil in the shore, subject to the restrictions above mentioned.

And we believe that the course of judicial decision, so far as it can now be ascertained, tends to confirm the opinion, that, after the adoption of the colony ordinance, all riparian proprietors had a fee in the flats adjoining their land, over which tide waters ebbed and flowed, until severed by some deed or act of the owner, competent to convey or transfer real estate. We are not aware of any adjudication upon this subject prior to the revolution; and it is highly probable that the right was not drawn in question for many years, in the courts of justice. On the greater part of the coasts and shores, the bays and inlets of salt water, the right was for a long period, and in regard to many of them still is, of no value, and of course would not be the subject of litigation. It is only in and near populous towns, and frequented ports and harbors, and in consequence of the exigencies of navigation and commerce, that the lands flowed by the tides become useful and valuable. In Boston, which was for a long time the principal port of the colony, navigation was confined mostly to the cove lying on the easterly side of the town,

lying on a circular shore, and in regard to this, an arrangement was made by a mutual agreement, between the colonial government and the riparian proprietors within the cove in 1674, by which a cross wharf was erected on the outside from one point of this circular cove to the other, to be used partly for the purposes of commerce, but mainly as a barricade to serve as a defence against an apprehended attack of the Dutch from Manhadoes; a barricado, in the spirited language of the time, to play guns upon. *Conventio legem vincit*; this compact fixed the limits of the rights of the proprietors to flats within the cove, and left no room for question. Whatever force and effect may have since been attributed to the barricado agreement, it was long regarded as of binding force, regulating the rights of riparian proprietors within the cove. It is perhaps now of no other importance, than as it accounts for the fact, that there was no litigation or judicial decision, in regard to the rights of riparian proprietors, in that part of the principal port in which they would have been most likely to occur.

Since lands of this description have become valuable, the subject has often been brought before the courts, but as there were no regular reports published prior to 1804, it is difficult to trace the law to an earlier time, except as it was declared by those judges and jurists, whose memory and traditional knowledge extended to an anterior period. We will cite a few of them.

Mr. Sullivan, in his *History of Land Titles in Massachusetts*, published in 1801, alludes to the subject, cites the colony ordinance, and treats it as having effected a great change of the law of Massachusetts, in regard to the right of property in the soil in navigable waters, where the sea ebbs and flows. Sullivan, 284. Mr. Dane, who may be considered as a lawyer of the old school, and who had devoted many years of his life to the study and exposition of the laws of Massachusetts, treats this subject more at large. 2 Dane Ab. 694. After citing the usual authorities to show, that by the common law the property in the soil of land over which the tide ebbs and flows was in the king, he proceeds to state that the statute

laws in this state have made several material alterations in some of these subjects. He cites the colony ordinance at large, and says this old and important law is now constantly practised upon, in regard to harbors, beaches, flats-grounds, and wherever the tide ebbs and flows, as well respecting fishing and flowing, as the right of soil. And he adds, many actions have depended on this law, and instances real actions to recover the soil or ground where the tide ebbs and flows, whenever taken possession of and claimed by another. This is perhaps the best evidence now to be obtained of what the law was, prior to the regular publication of reports, showing that the rule of the colony ordinance was recognized and practised upon, extending the right of riparian proprietors to low water mark, which at common law they had to ordinary high water mark, which was a title in fee. Mr. Dane cites two cases, in which this rule was considered and applied; *Commonwealth v. Pierce*, S. J. C., Essex, November, 1790; *Commonwealth v. Crowninshield*, S. J. C., Essex, November, 1796.

The first reported case on this subject is that of *Austin v. Carter*, 1 Mass. 231. Though the report is exceedingly brief, which is much to be regretted, yet the judgment is quite decisive on several points: First, that the owner of land bounding on tide waters, has property in the flats to low water mark, and may maintain trespass *quare clausum*, against any one who shall enter and cut down piles placed there by the owner, with a view to build a wharf, or otherwise inclose the flats: Second, that although the owner has a right to build on his flats and exclude all mankind, yet until he does so build, or erect some structure which may exclude others, and whilst the tide is up, and the land covered with salt water, every townsman, and every other person, has a right to pass through and over the same, with boats or vessels, and commits no trespass upon the owner in doing so.

Upon this last point, we may as well remark here, that the right of the riparian proprietor, under the ordinance, has always been held subject to this rule; that until he shall build upon his flats or inclose them, and whilst they are covered

with the sea, all other persons have the right to use them for the ordinary purposes of navigation. This probably results from the general and acknowledged right of the public to navigate the sea and all its arms and branches; and so long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right to the appropriate use of them.

Mr. Dane intimates, (2 Dane Ab. 700,) that the case of *Austin v. Carter* goes too far, in stating that the riparian proprietor has an absolute right under the colony law, so to build to low water mark and exclude all mankind. But it is to be considered, that the court gave no opinion; affirming only in general terms the doctrine advanced by the defendant's counsel. No qualification, therefore, to the general rule was expressed, not even the limitation to one hundred rods, or the condition not to hinder the passage of boats and vessels, &c. And further, this judgment must be construed according to the subject matter, which was, the right to flats then in controversy, belonging to land adjoining Charles River, at or near the old ferry way, between Charlestown and Boston, where the river was broad, and where the channel or deep part of the river was quite wide, and afforded abundant room for any boats or vessels to pass along the river and to other men's houses and lands. Had the court been giving an opinion in regard to flats differently situated, there is no reason to doubt that they would have qualified it by stating the proper conditions and limitations. The court were unanimous, and consisted of Dana, C. J., Strong, Sewall, Sedgwick, and Thatcher, Js.

The next case to which we would refer is that of *Storer v. Freeman*, 6 Mass. 435. It is to be remarked that this case concerned a parcel of flats, lying between high and low water mark, at Cape Elizabeth, in the county of Cumberland, Maine, and that the province of Maine was not within the jurisdiction of the colony of Massachusetts when the ordinance was passed, so as to be directly bound by its legal enactments. This circumstance is not taken notice of by the court, nor is

it material; for it may as well be remarked here as any where else, that the rule or principle of the colony ordinance, having been adopted and practised on in every part of the province of Massachusetts, after the union of the colony of Massachusetts with Plymouth and Maine, and also with Nantucket and Martha's Vineyard, by the province charter of 1692, the same rule, extending riparian ownership to low water mark, is now held to extend to all these territories. *Codman v. Winslow*, 10 Mass. 146; *Barker v. Bates*, 13 Pick. 255; *Mayhew v. Norton*, 17 Pick. 357; *Lapish v. Bangor Bank*, 8 Greenl. 85. It has also been held that the same rules apply as well to the shores of the open sea as to those of coves, creeks, and arms of the sea. *Barker v. Bates*, 13 Pick. 255; *Sale v. Pratt*, 19 Pick. 191.

It was remarked by the court in the case of *Storer v. Freeman*, that the colony ordinance was annulled with the charter, by the authority of which it was made. The strict correctness of this remark may perhaps be doubted, even though the decree in chancery of 1685, by which the charter was adjudged forfeited, were regular and valid, which we believe has never been admitted here. In general, a revolution or change in the form of political government does not annul the municipal laws regulating property, or divest rights of property acquired under them. If the remark was intended only to intimate that the *jus publicum*, the right of governing, controlling, and regulating the sea and sea-shores, and the powers and prerogatives of the king for the protection of public rights, which had been transferred to the colonial government by the charter, would be taken away by a valid revocation of that charter, without affecting private rights already vested, it may be admitted to be correct. But, however that may be, it has become a mere question of speculation, and ceased to be of any practical importance, even within the old territory of the colony of Massachusetts, because the same rights and powers, and all doings under the charter, were revived and confirmed by the province charter; and by the very first act under the provincial government, making a temporary provision, and by a subsequent act, passed soon after, continuing

the former in force and making it perpetual, it was declared that all the local laws made by the late governor and company of Massachusetts Bay and New Plymouth, do remain and continue in force in the respective places for which they were made. Ancient Charters, 213, 229.

The case of *Storer v. Freeman* is of high authority as a precedent, and has a strong bearing upon the question we are discussing. The opinion was given by Parsons, C. J. It had been argued that the ordinance had annexed the flats to the upland rather as an appurtenance than as an extension of the limits of the owner's land. The court first state, that, by the common law of England, the owner of land bounded on the sea, or on any arm of the sea where the tide ebbcd and flowed, could not by such boundary hold any land below the ordinary high water mark, for all the land below belonged of common right to the king; but the subject might claim the land below high water mark against the king, either by grant or prescription. They then add, that to induce persons to erect wharves below high water mark, which were necessary to the purposes of commerce, the common law of England was altered by an ordinance providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb and flow more than one hundred rods; but that the rights of others to convenient ways are saved. This case decides that the flats are held by the riparian proprietor, subject to an easement for a convenient right of way; that he takes them as land, and not as an incorporeal right; and that whether they pass or not by a particular conveyance, depends on the question, whether they are included in the description so as to pass as parcel. The same points were decided in another case which soon followed. *Codman v. Winslow*, 10 Mass. 146.

The next case to which we would refer, is that of *Commonwealth v. Charlestown*, 1 Pick. 180. The whole of this case is very instructive. Several points are decided, which we will state without stating the case at large.

1. That by the common law the right of the soil of the shore between the high and low water mark, and all arms of

the sea, coves, and creeks, where the tide ebbs and flows, are the property of the sovereign, unless appropriated to some subject by grant, or prescription which presupposes a grant.

2. That by the letters patent and charter of Charles I., all right in the waters and shores of the sea was transferred to the company who undertook the settlement of the colony of Massachusetts, who were thereby made a body politic, giving them absolute property in the land within the limits of the charter, the power of making laws for the government of the colony, and full dominion over all the ports, rivers, creeks, and havens, in as full and ample a manner as they were before held by the crown of England; and that by these charters, the acceptance of them, and proceedings under them, the people, of the colony, in their politic capacity, succeeded to all the territorial rights, franchises, and immunities, which had ever belonged to the sovereign power of the parent country.

3. That among the earliest acts of legislation was an exercise of sovereignty with respect to the shore or flats of coves, creeks, &c., which abounded all over the coast. The desire and necessity for wharves, quays, and piers, were soon felt by individuals and the community, and to encourage them, the government transferred its property in the shore of all creeks, coves, and other places upon the salt water where the sea ebbs and flows, giving to the proprietor of the land adjoining, the property of the soil to low water, not exceeding one hundred rods. This was a grant of so much of the shore, &c.

4. That the exceptions and provisions in this ordinance show clearly that the principles of the common law, relating to this kind of property, were well understood by the colonial legislature. By this grant of the property, those who acquired it were restricted from such a use of it as would impair the public right of passing over the water in boats and other vessels, through any sea, creeks, or coves, to other men's houses or lands. The result is that the ordinance made no alteration in the use of places there described, while they are covered with water; and further, that the proprietor of the flats can lawfully erect nothing upon them which will obstruct or hinder such passage, though he may build wharves towards the sea, if he

do not thereby straiten or interrupt the passage over the water so as to constitute a public nuisance.

5. That none but the sovereign power can authorize an interruption of such passages, because it has power to judge of what the public convenience requires, and may enact conditions to preserve the natural passages; that all navigable rivers are public property, for the use of all the citizens; and that there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them.

The views, we believe, that the courts of this state have constantly taken of the construction of the colony ordinance, are these: That it vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was to be held subject to a general right of the public for navigation until built upon or inclosed, and subject also to the reservation that it should not be built upon or inclosed in such manner as to impede the public right of way over it for boats and vessels. We are not aware that this has been drawn in question by any judicial decision; but on the contrary we think that this construction has been uniformly recognized, adopted, and applied, as occasion has required. Instead, therefore, of pursuing this analysis of the cases further, we will enumerate some of the most important of them, coming down to the latest period. *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Valentine v. Piper*, 22 Pick. 85; *Gray v. Bartlett*, 20 Pick. 186; *Sparhawk v. Bullard*, 1 Met. 95; *Ashby v. Eastern Railroad*, 5 Met. 368; *Piper v. Richardson*, 9 Met. 155; *Drake v. Curtis*, 1 Cush. 395; *Walker v. Boston & Maine Railroad*, 3 Cush. 1; *Gray v. Deluce*, 5 Cush. 9.

The same principles have been affirmed by a series of decisions of the supreme court of Maine, and the circuit court of the United States in Maine, holding that the principles of the Massachusetts colony ordinance have been established by usage and adoption, and long held as the common law of that state. *Knox v. Pickering*, 7 Greenl. 106; *Dunlap v. Stetson*, 4 Mason, 349, 366; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Emerson v. Taylor*, 9 Greenl. 42; *Deering v. Long Wharf*, 12 Shep. 51, 64.

There is another view of the subject, leading to the same result, arising from the established remedies for any injury or damage done to this species of property. The following cases, though they do not bear directly upon the main question, do, by necessary implication, involve the conclusion, that flats are deemed to be land and real estate, and not an appurtenance or incorporeal right.

1. That a writ of entry—a remedy exclusively appropriated to the recovery of lands—will lie for flats, though uninclosed by the owner, if he be disseised of them, as he may be by actual possession of them being taken by another.

2. That trespass *quare clausum fregit* lies for any injury done to the owner's lawful possession of flats—a remedy wholly inapplicable to the disturbance of an easement or incorporeal right.

3. That flats will not pass as appurtenant to land, because it is an established rule that land cannot pass as appurtenant to land, although it may pass as appurtenant to a messuage; but it would pass, although land, as appurtenant to a wharf.* *Doane v. Broad Street Association*, 6 Mass. 332.

4. That the upland and flats may be severed by the owner, at his pleasure; he may aliene the flats or any part of them without the upland, or the upland without the flats; and it will depend on the descriptive terms of the conveyance, embracing or excluding them, whether any and what part of them will pass. *Lufkin v. Haskell*, 3 Pick. 356.

We have thought it proper to examine, with some care, the foundation, on which the right of property in land, situated between high and low water mark in Massachusetts, rests, though it has not been much contested in reference to these harbor lines, except indirectly, and in vague and general terms. And we think it is entirely clear that, since the adoption of the colony ordinance, every grant of land, bounding upon the

* It has been decided, in a modern case in England, that land on the shore, in front of a wharf, does not pass by a demise of the wharf, because one piece of land cannot, in point of law, be appurtenant to another. But it does not affect the authority of the case cited, on the point for which it is referred to. *Buszard v. Capel*, 8 B. & C. 141.

sea, or any creek, cove, or arm of the sea, and either in terms including flats to low water mark, or bounding the land granted on the sea or salt water, with no terms limiting or restraining the operation of the grant, and where the land and flats have not been severed by any intervening conveyance, has had the legal effect to pass an estate in fee to the grantee, subject to a limited right of way for boats and vessels. We have seen that the entire right of property in the soil was granted by the charter to the colonists, with a full power of disposal, and that the colonial government was clothed with so much of the royal prerogative and power, as was necessary to maintain and regulate all public rights and immunities in the same. If land so situated had, previously to the ordinance, been conveyed by the government, to companies of proprietors or individuals, the act was in the nature of a grant of the flats to such prior grantees. It is said that it was not of itself a grant, but a general law affecting the character of property. Be it so. It was an authoritative declaration of owners, having a full right of property and power of disposal, annexing additional land to that previously granted, to hold in fee, subject to a reserved easement; and, if not strictly a grant, it partook of most of the characteristics of a grant, and could not be revoked by the power that gave it. In regard to all grants made by the government after the ordinance, the terms of the grant, bounding the lands granted upon the sea, or arm of the sea, or places where the tide ebbed and flowed, would, *ex vi termini*, carry a fee to low water mark, or one hundred rods; so that in one or the other alternative, this ordinance must govern and control the shore rights of riparian proprietors in every part of the commonwealth.

II. Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the acts establishing the harbor lines, and what is the legal validity and effect of those acts.

There is now no occasion and no ground to deny or question the full and sovereign power of the commonwealth, within its

limits, by legislative acts, to exercise dominion over the sea and the shores of the sea, and all its arms and branches, and the lands under them, and all other lands flowed by tide water, subject to the rights of riparian ownership. Whether any portion of this sovereignty remained in the British crown after the colonial and provincial charters were granted, it is now immaterial to inquire; for it is quite certain that the entire right of property in the soil was granted to the colonists in their aggregate capacity, and if any power remained in the crown, it was that of dominion and regulation of the public right, and this was wholly determined by the Declaration of Independence, acknowledged and acceded to by the treaty of peace, sanctioned by an act of parliament. This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, as between the several states and the United States, whatever may have been the doubts on the subject, it is settled that it vested in the several states, in their sovereign capacity, respectively, and was not transferred to the United States by the adoption of the constitution intended to form a more perfect union. Special jurisdiction has been from time to time vested in the general government for special purposes, but the general jurisdiction remains with the several states, subject, however, to such regulations as congress may make in the exercise of their admitted powers to regulate foreign commerce, and commerce among the states. Such is the principle determined by the supreme court of the United States, the ultimate tribunal to decide questions of this kind. *New Orleans v. The United States*, 10 Pet. 662, 737; *Pollard v. Hagan*, 3 How. 212.

But the power of the commonwealth, by the legislature, over the sea, its shores, bays, and coves, and all tide waters, is not limited, like that of the crown at common law. By the common law, the king was held to be the owner and proprietor of the soil under the sea, its shores, and all tide waters, and as such could grant the right of property therein to a subject; though this was not usually done without the previous execution and return of a writ of *ad quod damnum*, to ascertain

whether such grant would cause any injury to any public right. But it was further held, at common law, that, beyond a right of property, the king's prerogative extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights in the navigation and fisheries; that these were among the regalia or incidents of sovereignty, which could not be alienated by a royal grant alone, or held by a subject. But we believe it was never doubted that the British parliament, exercising all the powers of dominion and sovereignty, had full authority to regulate, protect, and secure all public rights; and it is under this authority, we suppose, that acts have often been passed regulating ports, harbors, and tide waters. *Lowe v. Govett*, 3 B. & Ad. 863; *The King v. Montague*, 4 B. & C. 598; *Attorney General v. Burrige*, and *Same v. Parmeter*, 10 Price, 350, 378, 412.

Supposing, then, that the commonwealth does hold all the power which exists anywhere, to regulate and dispose of the sea-shores, and tide waters, and all lands under them, and all public rights connected with them, whether this power be traced to the right of property or right of sovereignty as its principal source, it must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient. Assuming, then, that the commonwealth does hold this power, within certain limits, the question recurs, whether the acts under consideration are within its just and legitimate exercise.

In considering this question, it becomes necessary to inquire, and ascertain as far as practicable, the nature and character of the laws in question, and the object which the legislature had in view in passing them. The first act, though not the one upon which this prosecution is founded, was passed on the 19th of April, 1837, *St.* 1837, c. 229, and is entitled "an act to preserve the harbor of Boston, and to prevent encroachments therein." It establishes a line by local objects designated along the easterly and northerly side of the city, from the lower South Boston Free Bridge, around to a point

above Charles River Bridge, and provides, § 3, that no wharf, pier, or building, or encumbrance of any kind, shall ever hereafter be extended beyond the said line, into or over the tide water of said harbor.

The next succeeding act was passed on the 17th of March, 1840, *St.* 1840, *c.* 35. It establishes the line of the harbor, from the lower free bridge, on the Boston side, to the old South Boston Bridge, and on the South Boston side, from the old South Boston Bridge to the Free Bridge, and thence easterly. The fourth section of the act of April 26, 1847, *St.* 1847, *c.* 278, establishing certain lines in South Bay, is the statute upon which the present prosecution is instituted. The premises of the defendant are situated on the South Boston side, immediately above the upper bridge. This act provides, § 1, that no wharf or pier shall ever be extended beyond said line into or over the tide water of the commonwealth. Section 5 reiterates this prohibition, and § 6 provides that any person, offending against the provisions of the act, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor and punished, by indictment; and that any erection or obstruction, which shall be made contrary to the provisions and intent of the act, shall be liable to be removed and abated as a public nuisance. The other acts recited in the indictment, extend the line, with similar provisions, to other parts of the harbor, but do not materially affect the present question.

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it

under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious, that all well regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of

noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non lædas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.

These principles were somewhat discussed, and similar views were substantially adopted, in the case of *Commonwealth v. Tewksbury*, 11 Met. 55. Perhaps the facts in that case were imperfectly stated, or some of the positions and illustrations were expressed in too broad and unqualified a manner; but we are of opinion that the principle on which that judgment proceeded was correct. It assumes that all real estate, inland or on the sea-shore, derived immediately or

remotely from the government of the state, is taken and held under the tacit understanding that the owner shall so deal with it as not to cause injury to others; that when land is so situated, or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages, render rivers, ports and harbors shallow, and consequently desolate, and thereby destroy the valuable rights of other proprietors, both in the navigation of the stream, and in the contiguous lands. It expresses nearly the same legal truth, which is expressed in the familiar maxim, that no owner, through whose land a natural watercourse runs, can lawfully divert it to the damage of others. But what is the diversion of a watercourse? Ordinarily, and when no such circumstances exist, the owner of land has a perfect right to use and remove the earth, gravel and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely intends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out, and all the mischievous consequences of diverting the watercourse will follow. He must be presumed to have intended all the necessary and natural consequences of his own acts; of course that he intended, by those acts, to divert the watercourse; and the law holds him responsible for them accordingly. Principles are tested by taking extreme cases. Take the case of the river Mississippi, where large tracts of country, with cities and villages, depend for their protection upon the natural river bank, which is private property. Perhaps, under such circumstances, it might not be too much to say, not only that the owner cannot do any positive act towards removing the embankment, but that he may properly be held responsible for the permissive waste of it, by negligence and inattention. And the

other cases hereinbefore stated, though very different in their facts, are similar in principle, all being cases in which the specific use prohibited, is so prohibited because it would be noxious, and cause or threaten damage to the lives, health, comfort, or property of other members of the community, equally entitled to protection. We think, therefore, that that case was rightly decided.

Supposing the principle itself to be well established, the great question then is, whether the act in question, fixing certain harbor lines, was within it; and we are of opinion that it is, although it may in some cases seem to trench somewhat largely on the profitable use of individual property. This opinion is founded on several considerations.

We have already alluded to the point, that a particular use of land, as well inland as on the sea-shore, which, in one situation, would be greatly injurious to common and public rights, in another position would be wholly harmless. A man having a hill of gravel on his farm, not constituting the embankment of a stream, may remove the earth at his pleasure, because such use can injure no one; when under other circumstances, it would be greatly injurious. Whether any restraint upon the use of land is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be judged of by those to whom all legislative power is intrusted by the sovereign authority of the state, so to declare and regulate as to secure and preserve all public rights.

We think it is a consideration entitled to some weight, that the colony ordinance itself, which changed the tenure and extended the title of riparian proprietors to low water mark, so as to include the shore, was not absolute and unqualified. It contained a reservation, to the effect that riparian proprietors should not, by this extension of their territorial limits, have power to stop or hinder the passage of boats and vessels, in or through any sea, creeks, or coves, to other men's houses or lands. From these very general words, it is certainly difficult to prescribe exact limits to this reservation. That it was designed to impose some restriction in favor of the right of navigation is quite clear. To say, as it has sometimes been

contended, that the reservation was intended to prohibit any restraint upon the preëxisting right of navigation, and that all persons should have the same right of passing over it, with boats and vessels, as they had before, would seem to restrain any building thereon, and to render the act nugatory and of no practical effect. Besides; if the purpose was, as it has often been declared to be, to enable proprietors bounding on the shore to erect, and build quays, wharves and warehouses thereon, for purposes incident to the great interests of commerce and navigation, such a construction of the act would defeat the purposes for which it was designed.

Again; the construction which has been put upon this act, in all the judicial decisions which have been made upon it, many of which are cited in the former part of this opinion, has been, that, notwithstanding the act vests a fee in the soil in the riparian proprietor, analogous to the *jus privatum*, or right of property, which at the common law the crown could grant to a subject, yet that the land between high water and low water, until it was inclosed, built upon, or so occupied by the riparian proprietor, so far partook of its original character, that whilst covered by the tide water the public and all persons might lawfully use it, might sail over it, anchor upon it, fish upon it, and by so doing no person should be held to commit a trespass, or disseise the owner, or take adverse possession. The public used only a common right, by so using these lands when covered with tide water.

In putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it. Looking at the terms of this law, and the purposes for which it was intended, the object seems to have been, to secure to riparian proprietors in general, without special grant, a property in the land, with full power to erect such wharves, embankments and warehouses thereon, as would be usually required for purposes of commerce, subordinate only to a reasonable use of the same, by other individual riparian proprietors and the public, for the purposes of navigation, through any sea, creeks or coves, with their boats and vessels.

In this connection, it may be proper to refer to the common law of England, as it existed at the time of the passing of the colony ordinance upon this subject; for though, on account of the difference of political organization, it cannot apply strictly to Massachusetts, either before or since the revolution, yet the principles of the common law may throw light on the subject, and aid us in coming to a true construction of that ordinance.

By the general rule of the common law, all real property capable of use and possession, and having no other acknowledged owner, is, in theory, vested in the king, as the head and sovereign representative of the nation. The sea-shore, and all coves, bays and arms of the sea, as well as all navigable rivers, extending on the sea-shore as far towards the land as the tide flows, are deemed vested in and held by the king. In this holding by the crown, two distinct rights are regarded; viz. 1. The *jus privatum*, or right of property in the soil, which the king may grant, and which may be held by a subject, and the grant of which will confer on the grantee such privileges and benefits, as can be enjoyed therein, subject to the *jus publicum*. 2. The *jus publicum*, the royal prerogative, by which the king holds such shores and navigable rivers, for the common use and benefit of all the subjects, and indeed of all persons of all nations at peace with England, who may have occasion to use them for the purposes of trade. This royal right, or *jus publicum*, is held by the crown in trust for such common use and benefit, and cannot be transferred to a subject, or alienated, limited or restrained, by mere royal grant, without an act of parliament. The king's grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon, as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance, as the case may be.

Two or three passages from Lord Hale, the acknowledged authority upon this subject, will render this matter clear.

Hale *de Jure Maris*, chap. 4. "It is admitted that *de jure communi*, between the high water and low water mark doth

primâ facie belong to the king, 5 Rep. 107; *Constable's Case*, Dyer, 326." "And as the shore of the sea doth *primâ facie* belong to the king, viz., between the ordinary high water and low water mark, so the shore of an arm of the sea, between the high and low water mark, belongs *primâ facie* to the king, though it may also belong to a subject, as shall be shown in the next chapter." 1 Hargr. Law Tracts, 12, 13.

Hale *de Jure Maris*, chap. 6. "But though the subject may thus have the propriety of a navigable river, part of a port, yet these cautions are to be added," &c. "2. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances," &c. "For the *jus privatum* of the owner or proprietor, is charged with, and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damaged." 1 Hargr. Law Tracts, 36.

So in Lord Hale's part second, *De Portibus Maris*, chap. 7. "But when a port is fixed," "though the soil and franchise or dominion thereof *primâ facie* be in the king, or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both native and foreigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse." "They ought to be preserved from impediments and nuisances, that may hinder or annoy the access or abode or recess of ships and vessels, and seamen, or the unloading or relading of goods." 1 Hargr. Law Tracts, 84.

It therefore appears, upon the authority of Lord Hale, that in regard to the sea-shore, arms of the sea, and navigable rivers, the king stood in two capacities, holding a *jus privatum*, or right of property in the soil, and also a *jus publicum*, or right, as sovereign, to hold such property under his royal authority, and power to regulate and govern, for the common use and benefit of all persons, for the purposes of navigation. The authority of Lord Hale, and the truth and soundness of

these positions, have been recognized and affirmed, in cases comparatively recent, by the highest tribunals of England, the court of exchequer, and the house of lords. *Attorney General v. Burrige*, 10 Price, 350; *Attorney General v. Parmeter*, 10 Price, 378; *Parmeter v. Attorney General*, 10 Price, 412, the latter being decided on appeal to the house of lords.

These cases distinctly affirmed the proposition, that whether an erection within tide water is a nuisance or not, does not depend on the question whether the party erecting it owns the soil or not, by a grant directly or immediately from the crown, but whether it is injurious to a port or harbor, or injurious to navigation, and to the common right and liberty of all subjects, and other persons, using the navigation.

We have already said that these rules could not be applied strictly in this state, either under the colonial or provincial government, or under the present constitution of the commonwealth, because there is no executive, holding two capacities, like the king of England, as head and sovereign of the kingdom. But as the colonial charter, in the first instance, and the province charter, reviving and confirming all the rights and powers granted by the former, if they had been in any degree impaired by its abrogation, were not made for regulating any rights within the territory of England, but were designed and intended to provide for a distinct colonial and dependent government, acknowledging continued allegiance to the king; they embraced as well the *jus publicum*, as the *jus privatum* of the crown, and embraced not only a grant of the soil of all seas, arms of the sea, and navigable rivers, but also conferred on the grantees so much of the *jus regium*, or royal prerogative, as might be necessary to control and regulate the admitted common-law right of all subjects and others, to the use of all benefits, both of fishing and navigation, connected with and dependent upon the sea and sea-shores, and all tide waters.

These principles are fully recognized and established in regard to other colonial governments, originating in charters granted by the crown of England in the early settlement of this country. Under the grant of Charles II. to his brother,

the Duke of York, the powers of government, as well as the right of soil, were held to be granted; but afterwards, in the time of queen Anne, a surrender was made by the proprietors, of the powers of government, and it was held that thereby the royalty, the *jus publicum*, or right of government, revested in the king, though the *jus privatum*, or right of property, remained with the proprietors. This clearly recognizes the distinction between the *jus publicum* and *jus privatum*, as established by the common law, and so established long before the settlement of this country. It was also held, that as a part of the royalties, or *jura prerogativa*, which revested in the crown, and afterwards, by the establishment of the independence of the United States, vested in the states respectively, was the right to control and regulate the use of the sea and salt water, for all the purposes of navigation and fishing, to be held and used as a common benefit for the public. *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. 212; *Gough v. Bell*, 1 Zab. 156, and 2 Zab. 441.

We think it clear therefore, that the colony charter, revived and confirmed as it was by the province charter, was not a mere grant of the soil of the territory of Massachusetts, but carried with it so much of the royal prerogative, as was necessary for holding, appropriating, and governing the sea and its shores, arms and branches, and also so much, as was necessary for securing the acknowledged common and general right of the subjects to its free navigation and fisheries. These powers vested in the colonial and provincial governments, and were vested in the commonwealth after the revolution, together with all other royalties, rights of the crown, and power of regulation, which had at any time previously been held and exercised by the government of England. But for reasons already given, the distinction between the *jus publicum* and the *jus privatum* could not be applied to the colony ordinance, as if it were a grant of the crown, without the sanction of parliament, because both powers vested in the colonial government, and may be taken into view in giving effect to the colonial ordinance.

But the use which we think may be justly made of these

principles, and of these views of the law of England, as it had existed long anterior to the emigration of our ancestors to America, is this: They had been accustomed to regard the use of the sea-shores, for navigation and fishing, as *publici juris*, to be held and regulated for the common and general benefit; and this, although in many cases the right of soil was vested by private grant in an individual. They had long been familiar with the practice of the crown to make grants of the *jus privatum*, or right of property in the soil, in the sea-shore over which the tide ebbed and flowed, which would warrant the grantee of the crown in erecting thereon wharves, quays, and warehouses, for facilitating navigation and commerce, provided such erections did not hinder or obstruct navigation, or become a nuisance. If such a wharf or other erection were such as to interfere essentially with the common right of navigation, it would be held by the common law to be a common nuisance, and could not be justified, even by the king's grant, unless sanctioned by an act of parliament. These rules and practices were familiar to the minds of our English ancestors at their emigration, and we may presume that the colonial government had them in view when, by a general act, it annexed the sea-shore to the upland, and made it the private property of the riparian proprietor. It must have well understood that all estate granted by the government to individuals is subject, by reasonable implication, to such restraints in its use, as shall make the enjoyment of it by the grantee consistent with the equal enjoyment by others, of their several and common rights. When therefore the government did, by such general act, grant a right of separate property in the soil of the sea-shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same act reserved some right to individuals and the public of passing and repassing with vessels, but without defining it, it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved, than it otherwise would be under other circumstances.

And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to

apply more significantly and more directly to real estate thus situated on the sea-shore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the sea-shore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value.

Considering, therefore, that all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character; considering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints, in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others, and injurious to the public, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.

Wherever there is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such

right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades ; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings ; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law ; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences ; but more especially for the sake of having a definite, known and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter-house, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, every body might agree that two hundred feet would be too near, and that two thousand feet would not be too near ; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise ? An authoritative rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a

nuisance; builders of houses need to know, to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations. This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties.

Many cases will suggest themselves, where the legislature interposes by statute to declare, protect and regulate public rights, although those rights are public easements only, over lands of which the fee of the soil is in private proprietors. Such are laws regulating the construction and repairs of roads, highways and bridges; declaring how they shall be graded, what barriers shall be erected to guard travellers against dangerous places, and what obstructions shall be removed.

Without attempting to enumerate the various cases of legislation which fall within this principle, we would refer, by way of illustration, to one class of public rights, very analogous to those of navigation and of fishing in the sea and on the sea-shores, which have been recognized and acknowledged as public, and as such regulated by legislative enactments, and protected by specific statute penalties; that is, the rights of the public in rivers not navigable. Technically, those rivers are not navigable where the sea doth not ebb and flow, although they may be very serviceable for navigation with boats and rafts, and even for larger vessels moved by sails or steam. Such are the Connecticut, the Merrimac, and many others, above the ebb and flow of the tide. In these rivers, it is the established rule of law in this commonwealth, that the riparian owner has a fee in the soil from his own side to the middle of the river, or *ad filum medium aquæ*. *King v. King*, 7 Mass. 496; *Lunt v. Holland*, 14 Mass. 149; *Hatch v. Dwight*, 17 Mass. 289; *Ingraham v. Wilkinson*, 4 Pick. 268. In rivers not navigable, the riparian owner is deemed, in virtue of his title to the soil, to have a several fishery in that part of the river which lies against his upland, to the centre of the river. *Freary*

v. *Cooke*, 14 Mass. 488; *Waters v. Lilley*, 4 Pick. 145; *Commonwealth v. Chapin*, 5 Pick. 199.

These may be considered as private rights in the shores of rivers not navigable, and therefore not pertinent to the present subject; but in addition to these are two acknowledged public rights, which are regarded as such, to be preserved and maintained for general and common use, although every portion of the soil over which the rivers flow, is the private property of the riparian owners. These are: 1. The right of passage with boats, rafts, and other vessels adapted to the use of such waters: 2. The right of the public to have these rivers kept open and free for the migratory fish, such as salmon, shad and alewives, to pass from the sea, through such rivers, to the ponds and head waters, to cast their spawn. Both of these rights are recognized as public rights in the case of *Commonwealth v. Chapin*, 5 Pick. 199. The defendant was indicted for erecting a dam across Connecticut River, near the head of South Hadley Falls, alleged to be a nuisance at common law in three respects: 1. As an obstruction to the navigation of the river: 2. As injurious to the health of the neighboring inhabitants: and 3. As an obstruction to the passage of fish through the river to its head waters. The jury, by their verdict, found that it did not obstruct the navigation, and did not injure the public health; but that it did hinder the passage of fish. The court decided that, though this river, at that place, was not navigable in the technical sense, yet that the right to navigate it with rafts, boats and other suitable vessels, was a public right, although the entire soil under it was owned by the riparian proprietors; that although such riparian owners had a several fishery on their own shores, it was the right of taking fish on those shores, but was subordinate to the public right, to have the fish, in their proper season, pass up to the head waters to cast their spawn, and that the riparian proprietors, although they owned the entire bed of the river, could not so use it as to obstruct the passage of fish; and lastly, that such public right might be declared, regulated and enforced by the legislature by statute.

We are not aware that the right of navigation, for boats, &c., in inland rivers, above tide waters, though technically not navigable, has ever been denied or seriously drawn in question. The case of *Spring v. Chase*, in '1799, before we had any regularly published reports, found in 2 Dane Ab. 696, may seem to throw doubt upon it. The action was for pulling down a bridge on Saco River, above the falls, and of course above the flow of the tide, which had been built by the plaintiff, who owned the land on both sides, and of course owned the soil in the bed of the river. The defendant justified, on the ground that the bridge was a public nuisance; but the court gave judgment for the plaintiff. The reasons are not stated; but this judgment may well have been warranted, on the ground that the plaintiff had a right to build a bridge on his own soil, if it did not impede the public right of navigation for rafts and boats; that all rafts, and such boats as could pass on that river, could well pass under the bridge, and so the bridge was not a public nuisance.

Many judicial decisions have declared this right of passage with boats and vessels on rivers not navigable, to be a public right, and many acts of legislation have been passed, authorizing dams across rivers, and wing-dams, connected with locks and side canals, to secure and facilitate their public right of inland navigation.

But the other public right in these rivers, and the manner in which it has been enforced by statute law, is much more to the present purpose. The right of having the migrating fish pass in their seasons through these rivers, over the soil of riparian proprietors, has been declared and enforced by statute, as a public right; and the private rights of riparian proprietors are held subject to such regulation. *Stoughton v. Baker*, 4 Mass. 522; *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. Ruggles*, 10 Mass. 391.

The most important of these cases, and most directly bearing on the present question, is that of *Stoughton v. Baker*. It respected a mill erected in 1633 by Israel Stoughton, under a grant from the town of Dorchester, and confirmed by the colonial government, at Milton Lower Mills, and was probably the

first mill erected in the colony. No reservation for the passage of fish up the Neponset was made in the grant, and no fishways were made until 1805, when the legislature appointed a committee, with authority to require such fishways to be opened, as would allow the fish to pass up. The court decided that the right to have the fish pass up was a public right; that every owner of a mill dam holds it under a limitation that a sufficient and reasonable passage shall be allowed for the fish; and that this limitation is not extinguished by any neglect of the government in compelling the owner to comply. The court, in their judgment, by Parsons, C. J., say, that "Stoughton took a fee in the mill privilege, with a right to build a dam; but this right was under several implied limitations; one was to protect the rights of the public in the fishery, so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it."

One early act is so direct an exercise of legislative power to declare and enforce a public right, and so exemplary an instance of the caution and forbearance, and the just regard for private rights, with which it ought to be used, that we desire to refer to it. It is the provincial act of 15 George II., passed in 1741. After reciting the great damage occasioned by the erection of dams, notwithstanding the several acts made for the preservation of the fish, it provides that all dams afterwards to be built across streams in which salmon, shad and alewives usually pass up, shall be made with sufficient fishways, and in all dams made before the passage of the act, such sufficient fishways shall be made and opened, at the expense of the owner; with a proviso, that any owner of a dam built before 1709, who was required by the act to open such fishway, should be reimbursed the first cost thereof; but that all such dams should be afterwards maintained at the expense of the owners. In this act it is manifest that the right to the fishery was a public right; that mill owners and all other riparian proprietors took their title in the soil, subject to the

public right; that this public right may be declared and enforced by statute; that those who have erected dams, before being warned and expressly prohibited by statute, although they infringed a public right, and might perhaps have been indicted at common law, were yet so far excusable, that, when specially required to make provision for the restoration and enjoyment of the public right, they should be repaid the first expense of the alteration, though, because it was a public right to which their private estate was subject, they should ever after maintain such passage way for fish at their own expense. Mass. Perpet. Laws, 297.

Now the only ground of principle on which these laws could have been made and sanctioned, and adjudged valid by the highest tribunals of the Commonwealth, is, that although the right of soil in rivers not navigable is in private proprietors, yet this is held subject to a public right; that although the violation of such public right by a riparian proprietor, or any one else, was a public offence, and as such might be punished at common law; yet, because it was a public right, the legislature might declare it, and regulate it by suitable enactments and penalties, by precise and positive rules, as to times and other particulars, better adapted to secure the right to the public, and guard all persons concerned against its infringement, than the general principle of the common law could be.

In the case of *Stoughton v. Baker*, the court say that the public, having a right to the benefits of this limitation, (for the passage of fish) there must be some remedy, by which this public benefit may be secured; and shortly after add: "the legislature may make all laws not repugnant to the constitution, and we do not know that this law is repugnant to it."

This power of the legislature to declare and regulate the public right, is asserted, perhaps even more strongly, in the more recent case of *Commonwealth v. Chapin*, 5 Pick. 199, in which it was decided that the provincial act of 15 George II. was still in force, and because it provided a different remedy for an injury to the public rights by building a dam, the com-

mon law was superseded by the statute, and therefore that an indictment at common law could not be maintained, but the prosecution must be on the statute.

But in reference to the present case, and to the act of the legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and

to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.

In regard to the case of Mr. Alger, the report states that a certain piece of wharf, called a triangular piece, was erected and placed in its position beyond the line, after the law fixing the line had been passed; but that some other portions, though actually beyond the line, were erected, and the obstructions complained of actually placed in their position, before the law was passed; and also that the wharf complained of does not obstruct the navigation of boats and vessels.

In regard to the first suggestion, it may be necessary to examine the facts more minutely before any final judgment is entered. If any portion of this erection, described in the indictment, had been actually made and placed in its position before the act was passed, the court are all of opinion that the owner is not liable to its penalties. These laws were future and prospective in their terms and in their operation. They proceed on the assumption, that before they were passed, every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation, and render him indictable as at common law; and that the common law, in thus lending its aid in the prosecution of actual injuries to navigation, to be proved in each case as nuisances, would be sufficient to secure the public against encroachments, without legislation. But, for the reasons hereinbefore given, it seems to us highly important to have a more precise and definite law made and promulgated, by which all persons may more certainly know their own and the public rights, and govern themselves accordingly.

If, indeed, before the passing of these laws, any one had so built into navigable water as to cause a public nuisance, he may be liable to indictment and punishment, but not by these laws, fixing harbor lines. It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would

be *ex post facto*, contrary to the constitution and to the plainest principles of justice, and of course inoperative and void.

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration, (the expediency and necessity of defining and securing the rights of the public,) which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

- On the whole, the court are of opinion that the act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.

RADDAI WIGHT & Wife vs. MARY BAURY.

A will, which was made and took effect before the passage of *St.* 1791, c. 60, § 3, contained the following provisions: "I give to my daughter S. the use and improvement of" certain real estate "during her natural life, and at her death I give the same to her children lawfully begotten." "I also give her, during her life," certain other estate. "But all the foregoing grants and bequests are given her only during her natural life, and then to descend to her child or children lawfully begotten, their heirs and assigns forever; but if she should leave no child, then to be equally divided among my grandchildren; it being my intention to entail as far as my grandchildren." S. had two children, both of whom were living at the death of the testator. It was held, that the will gave S. an estate for life, remainder to her children in fee.

In this case, which was argued and decided at the last November term, the facts appear in the opinion of the court.

C. M. Ellis, for the demandants.

S. Bartlett, for the tenant.

SHAW, C. J. This is a question arising under the will of Hugh Hall, made and proved in 1773, before the revolution, and proved before the Governor and Council.

The demandant claims an undivided half of the described premises, on the ground that, by the will, an estate for life was given to the testator's daughter Sarah Clark, then the wife of Elisha Clark, for her life, remainder to her children in fee tail, two of whom were then living, to wit, Hugh Hall Clark and Mary Clark, now the tenant, with remainder over to his other grandchildren; that Sarah Clark died; that Hugh Hall Clark having survived the testator, his grandfather died without issue shortly after the decease of his mother; that his estate tail was thereby determined, and the gift over to his other grandchildren took effect, under one of whom the demandant claims.

The clauses in the will, bearing upon this question, are as follows: "I give to my daughter, Sarah Clark, wife of Mr. Elisha Clark," &c., "the use and improvement of the tenement, wherein I now dwell," "during her natural life; and at her death, I give the same to her child or children lawfully begotten; and in the same manner, I give to my said daugh-

Wight & wife v. Baurý.

ter Sarah, the house lot adjoining;" "also the use of the front barn on my daughter Elizabeth's lot, during her life; I also give her, in the same way and manner, the tenement Mr. Bayley now lives in." "I also give my said daughter Sarah, during her life, the tenement rented to Mr. Norcross." "I also give her, during her life, one whole right of my land in Townshend," &c. "But all the foregoing grants and bequests are given her only during her natural life, and then to descend to her child or children lawfully begotten, their heirs and assigns forever; but if she should leave no child, then the foregoing bequests are to be equally divided among my grandchildren; it being my intention to entail as far as my grandchildren."

"As to my money, in the bank of England, which I ordered" certain persons named "to purchase, I order my executor to dispose of what is now due to me from each of their accounts, by drawing bills for the same, and laying out the amount in good brick houses in Boston, for the use of my two daughters, and then to descend to their children."

The testator also ordered all reversions of every kind, that he was entitled to, to be divided equally among his three children.

This devise was made and took effect, before the passage of the act, which altered the rule in Shelley's case in this commonwealth, and is to be construed and acted upon as if the statute had not been passed.

It appears by the facts that, at the time of the making of the will and the death of the testator, Mrs. Clark had two children living, Hugh Hall and Mary, that they both survived their mother, and then Hugh died leaving the present tenant Mary, now Mrs. Baurý, his only sister and sole heir at law. Upon the construction of this will, the court are of opinion, that the daughter took an estate for life, with a remainder in fee to the two children; that they took vested remainders subject to open and let in after born children, if any, to an equal share with themselves. But no other child was born. They therefore, upon the decease of their mother, took an estate in fee in equal shares.

The bequest to the daughter is in terms *for life, for her natural life*, studiously repeated; and after all the devises, he again repeats, for greater certainty, that all the devises to her are only during her natural life. This, however, according to the rule, might have been enlarged to an estate tail in her, by after words carrying a clear implication that the estate was to go to her issue indefinitely. But such is not the use of the words in the present case. The words are, to her for life, and then to descend to her child or children, lawfully begotten, their heirs and assigns forever. It is clearly not to the heirs of her body, which would, by force of the rule in Shelley's case, have created an estate tail by implication in her. The words, therefore, directing who are to take in remainder, her children lawfully begotten, are merely a designation of the persons who are to take in remainder, and are to be construed as words of purchase. In the actual case, as there were children in being, it is a vested remainder. It may be proper to remark, in passing, that if there were no child in being, at the death of the testator, it would have been a contingent remainder, until a child should be born, but would immediately vest on such birth. It may also be remarked, that in such event, if the tenant for life had destroyed the particular estate, before a child was born, in whom it could vest, it would be defeated. Nor does it change the character of this estate, that there was a devise over. If the two grandchildren, Hugh and Mary, took an estate in fee, the devise over would either be void, or could operate only as an executory devise.

In the manner in which the words are used, "if she should die leaving no child," then over, the devise clearly means, not if she should die leaving no issue, looking to an indefinite failure of issue; but, as the term naturally imports, leaving no child, *i. e.* leaving no child to take the estate in remainder, after the devise to the mother for life. But if she did leave any children, then the devise over had no effect, and such children by force of the devise took a fee.

In the case of *Goodright v. Dunham*, 1 Doug. 264, a devise of real estate to testator's son for life, and after his son's death to his, the son's, children and their heirs equally, and in

case the son should die without issue, then over, was held to give a fee to the children, notwithstanding the word issue would ordinarily give him, the son, an estate tail by implication; and the terms, if he die without issue, in their connection with other provisos, were held equivalent to the words, if he die without child or children. Lord Mansfield said, that the words "in case he die without issue," being tacked to the preceding clause, must mean the same thing as "and in case he dies without children."

Taking that to be the meaning of the words, it is an authority precisely in point to the present case, where the words are, "if she should leave no child."

We refer to *Doe v. Perryn*, 3 T. R. 484. The case was a devise to B, the wife of A, for life, remainder to the children of A and B, and their heirs forever, and for default of such issue remainder over; and at the death of the devisor, A and B having no child, it was held that the devises to the children were contingent remainders in fee, and the words "default of issue," were referable, not to a general failure of issue, but meant in case there should be no such child. Such remainders would be contingent, because no one was in being to take at the decease of the testator; but when any child should be born, the remainder would vest in such child, to open and let in others who might afterwards come into being. Here it was held, that "default of such issue" is equivalent to "default of such children," then over. So understood, that case is a precise authority for the present. *Ives v. Legge*, cited in a note, p. 488, illustrates the same rule.

The King v. The Marquis of Stafford, 7 East, 521. This case is an elaborate review of this whole doctrine, with the same result. After various provisions, the devise was to a granddaughter for life, with power of appointment by will or deed; and in default of such appointment, then to the children of said granddaughter lawfully to be begotten, and *their heirs*, as tenants in common; and in default of such issue, then over. It was held that the default of such issue must mean to refer to the children of the granddaughter, before mentioned, and that such children took an estate in fee.

Wight & wife v. Baury.

• We think these views are confirmed and illustrated in a late Treatise of Hayes on Real Estate, 29, 30, 31.

The case of *Bowers v. Porter*, 4 Pick. 198, as far as it goes, confirms these views; but it is cited principally to show the change of the law in this commonwealth, effected by *St. 1791, c. 60, § 3*, which was intended to alter the rule in Shelley's case.

The court are of opinion, that the clear effect of the devise was, to give an estate for life to Mrs. Clark, with remainder to her children in fee. But this devise being made before the statute, it may be proper to consider how the case would stand, under the rule in Shelley's case, which was a rule of the common law, in force before the statute. The words, to her for life, and at her decease to her children lawfully begotten, which are ordinarily words designating heirs of the body, if uncontrolled by other provisions, might seem, by force of the rule in Shelley's case, to create an estate tail in Mrs. Clark. But they are controlled. The devise to these children is in terms to them, their heirs and assigns forever; unequivocal words designating a fee simple. Now, if she took an estate tail, that is, an estate to her and the heirs of her body, it must go to the heirs of the body, till exhausted, and could be only an estate tail in those children; which is directly repugnant to the devise to them in fee, and therefore could not be so intended.

Again; the testator says in another clause, applied generally to these devises, "it being my intention to entail as far as my grandchildren." This carries a clear implication that the entail shall not extend beyond his grandchildren. Now this intent is contrary to the rules of law governing the entailment of estate, which is an estate of inheritance, but limited to a particular description of heirs, instead of general heirs. When such an estate is created by a devisor, it must continue, unless barred, until determined for want of heirs in tail, and even then, without some further limitation over, will revert to the heirs of the devisor. A devisor, therefore, who creates an estate tail, and declares an intention that, after a certain number of descents to heirs in tail, it shall become an estate in fee, and go to general heirs, declares an intent which the law will

Wight & wife v. Baury.

not carry into effect. But the clause in the present will is available to this extent, that it manifests an intention that his grandchildren, the children of his daughter, shall have an estate in fee. The intention manifestly was, what is repeatedly declared in his will, that his daughter should not have the power to alienate the inheritance, and prevent it from coming to the grandchildren; and this he attempted to do, by declaring his intention to entail as far as grandchildren, which he could not do; but this intention is accomplished by regarding the estate to her as an estate for life, with remainder to her children. The effect of the rule in Shelley's case, therefore, is controlled by other clauses and provisions in the will; it was not a devise to her for life, with remainder to her heirs generally, or to the heirs of her body, and of course not within the rule. The grandchildren took as purchasers, and not as heirs.

The court are of opinion that the legal effect of this devise was, to give Mrs. Clark an estate for life, with remainder to her children in fee, and that there is nothing in other parts of the will to vary this result. On the contrary, there are some provisions which tend to confirm this construction. We have already remarked upon the intent to entail as far as grandchildren, of course no further. There is another clause in the will, by which the testator directs that certain property shall be sold by his executors, they laying out the amount of the proceeds in good brick houses in Boston, for the use of his two daughters, and then to descend to their children. The form of giving the deeds by which the terms of such conveyances should be settled, is not mentioned in the will; but we think the intent of this direction would be accomplished by the executors, by holding the proceeds of such property in trust, for the daughters for life, and then for the grandchildren, until vested in houses, and then by laying out the same in the purchase of such brick houses, by deed, to the use of the daughters for life, remainder to the grandchildren in fee.

It is very important that certain well established rules in the construction of wills should be adhered to, for the sake of certainty in this important and difficult branch of the law; and therefore that slight variations of expression in a will,

Bryant v. Eastman.

often drawn in haste, and without much care or legal skill, should not vary these rules, upon any supposed differences in the intentions of testators, founded upon such expressions.

Upon our view of the construction of Hugh Hall's will, his grandson Hugh Hall Clark took an estate in fee in the premises, which upon his decease, intestate and without issue, descended to his mother, the tenant in the present action, as his only heir at law.

Judgment for the tenant.

JAMES R. BRYANT vs. ARTHUR M. EASTMAN.

A debtor sent a promissory note to his creditor in payment of a debt, by the hand of a third person, who, before delivering it, at the request of the creditor, and for the purpose of giving credit to the note, put his own name on the back of it. It was held that such third person was liable as an original promisor.

One who, while carrying on business on his own account, in the name of a company, which has been incorporated, but not organized, receives, in payment of a debt contracted with him in such business, a promissory note, payable to the order of the corporation, may transfer the note by indorsing it in his own name.

This was an action of assumpsit by the indorsee against the promisor on a note of which the following is a copy: "**\$250. Boston, Feb. 9, 1848. Six months after date, I promise to pay to the order of New England Steam & Gas Pipe Co., two hundred and fifty dollars, value received. LEMUEL LYON.**" On the back of the note was the name of the defendant, and underneath it the name of James Derby.

It appeared in evidence that, prior to the giving of the note in question, the legislature of New Hampshire had passed an act incorporating a manufacturing corporation by the name of the New England Steam & Gas Pipe Co. This company had never been organized, nor had any company been formed to act under the charter; but James Derby had opened an establishment in Boston, for the manufacture and sale of articles similar to those contemplated by the act of incorporation, and carried on the business in the name of said corporation, but

on his own sole account. Lyon contracted a debt at this establishment, and sent this note there by the defendant, and offered it in discharge of said debt; the name of the defendant not being then upon it. At the request of Derby, and for the purpose of making the note unquestionably good, the defendant put his name upon the back of it, and in that condition it was accepted by Derby. Derby afterwards indorsed the note in his own name to the plaintiff. The company was afterwards organized, but they never had any interest in this note.

The presiding judge of the court of common pleas, (*Wells*, C. J.,) instructed the jury that, if the defendant signed the note at the request of Derby, and for the purpose of removing all doubt as to the goodness of the note, and did it before the note was accepted by Derby in discharge of his account against Lyon, there was a sufficient consideration for the engagement of the defendant, and he would in that event be liable as an original promisor: That if Derby was carrying on business solely on his own account, but in the name and style of the New England Steam & Gas Pipe Co., and this name was assumed without practising or intending to practise any fraud upon any person, then the promise might be regarded as made to Derby, and he could transfer a legal title to another, by an indorsement of the note in his own name.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

L. Gale, for the defendant. 1. The defendant was not an original promisor. *Tenney v. Prince*, 4 Pick. 385; *Moies v. Bird*, 11 Mass. 436; *Dean v. Hall*, 17 Wend. 214; *Samson v. Thornton*, 3 Met. 275; *Union Bank of Weymouth and Braintree v. Willis*, 8 Met. 504, 509.

2. The plaintiff cannot maintain an action on the note as indorsee, because the name of the payee does not appear in the indorsement. *Chit. Bills* (10th Amer. ed.) 228; *Story on Notes*, § 35; *U. S. Bank v. Lyman*, 11 Law Reporter, 156, 166; *S. C.* 20 Verm. 666; *Shepard v. Hawley*, 1 Conn. 367. And the parol evidence, admitted at the trial to prove who the payee was, was incompetent. *U. S. Bank v. Lyman*, *ubi sup.*; *Story*

Bryant v. Eastman.

on Notes, § 35; *Stackpole v. Arnold*, 11 Mass. 27, and cases cited in Rand's note, 30; *Mayhew v. Prince*, 11 Mass. 54; *Arfridson v. Ladd*, 12 Mass. 173. To maintain this action, the plaintiff should be a *bona fide* holder, ignorant of the fact that the payee was fictitious. Story on Notes, § 39; 2 Greenl. on Ev. § 166; Story on Bills, § 200.

H. Jewell, for the plaintiff.

This case was argued and decided at November term, 1850.

SHAW, C. J. As to the first point, it seems to the court clear, upon the authorities, that the defendant was an original promisor. It is proved that he put his name on the back of the note, before it was received by Derby, for the purpose of giving credit to the note, in which case he is not regarded as indorser or guarantor, but as a surety acting upon the same consideration with the principal promisor. It may be regretted that this rule has been adopted, but it is now too well established to be questioned. *Hunt v. Adams*, 5 Mass. 358, and 6 Mass. 519; *Samson v. Thornton*, 3 Met. 275; *Union Bank v. Willis*, 8 Met. 504. Such a note is regarded a joint and several note, because each promises to pay, and both unite in the same promise.

The next point appeared at first to be one of more difficulty, namely, whether a note in form payable to the New England Steam & Gas Pipe Company, could be treated as a note payable to James Derby or order, and sued by him or his indorsee. Upon consideration, the court are of opinion that the action may be maintained.

It was proved that at the time the note was made, there was no company actually existing, carrying on business, of the name indicated as payees; such a company had been incorporated by the legislature of another state, but no company had been organized. It further appeared that James Derby was carrying on the business of the manufacture and sale of steam and gas pipes, and that Lyon, with whom the defendant gave the note as co-promisor, had contracted a debt with Derby, thus dealing under the name in question, and that this note was given in satisfaction of that debt. These are facts extraneous

Bryant v. Eastman.

to the note, not repugnant to it, and therefore may be proved by evidence *aliunde*.

It is a well settled rule, that a note or written simple contract may be declared on, according to its legal effect and operation. It has been decided that a note made to Richardson, Metcalf & Co., might be declared on in the name of the Medway Cotton Manufactory, on proof that such name was used by that corporation. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360. In a comparatively recent English case, where a note was made payable to a married woman during coverture, which, of course, was a note in legal effect payable to the husband at his election, it was declared on as a note by which the defendant promised to pay to John Fearn, by the name of Mrs. Rachel Fearn, and by said John Fearn indorsed to the plaintiff; and it was held good. *Burrough v. Moss*, 10 B. & C. 558. The same principles are adopted and affirmed in a recent case in this court. *Commercial Bank v. French*, 21 Pick. 486.

There is certainly an inconvenience in an individual carrying on business by a name or description other than his own, but we are not prepared to say that it is illegal;* and the inconvenience to the party himself is, in general, sufficient to prevent it. But there are instances, where, for the sake of notoriety, or preserving the good will of a trade, names are kept up, after the original parties have all disappeared, and the names of the parties really interested have all changed.

We do not consider it as a note payable to a fictitious payee, but as a note given to a real party, or his order, in satisfaction of a real debt contracted with that party, in a name not his own, but assumed and adopted as a business designation.

* The statute of 1853, c. 156, provides that "no person, carrying on business in this commonwealth, shall assume or continue to use, in his business, the name or names of any person or persons, formerly connected with him in partnership, or of any other person or persons, either alone or in connection with his own or any other name or designation, without the consent of such person or persons, or of his or their legal representatives in writing;" and that "the supreme judicial court shall have power in equity to restrain by injunction the use of any person's name in violation of this act."

Bartol v. Stanwood.

As this is a promissory note, which might be specially declared on, as a note given by the defendant, payable to Derby, by the name of the New England Steam and Gas Pipe Company, or his order, and by Derby indorsed to the plaintiff, it may be given in evidence, in an action by the indorsee against the promisor, in support of the money counts.

Exceptions overruled.

GEORGE BARTOL vs. WILLIAM STANWOOD.

By St. 1840 c. 87, §§ 4, 5, the rulings of the court of common pleas on the admissibility of evidence, and their instructions to the jury, on the trial of an issue joined on a plea in abatement, are not the subject of a bill of exceptions.

In this action, which was assumpsit, brought by the plaintiff, residing in Boston, against the defendant, a resident of Brunswick, in the State of Maine, no service of the writ was made, otherwise than by an attachment of the barque Sarah Ann, then lying in Boston, as the property of the defendant.

The defendant pleaded in abatement, that, at the time of the pretended service of the writ, he had no right, title, interest or property in said barque. And the plaintiff joined issue on this plea.

On the trial of this issue in the court of common pleas, certain evidence, offered by the defendant, was objected to by the plaintiff as incompetent, but admitted by the judge; and the jury, under his instructions, found a verdict for the defendant; whereupon the plaintiff alleged exceptions to the rulings and instructions of the judge.

The defendant now moved that the exceptions be dismissed, on the ground that by St. 1840, c. 87, the judgment of the court of common pleas on a plea in abatement is final, and that therefore no exception would lie in this case.

The case was argued and decided at the last November term.

F. L. Washburn, for defendant.

O. B. Low, for the plaintiff.

Boston v. Capen.

BY THE COURT. It is apparent, on looking at the record in this case, that the trial was of an issue joined on a plea in abatement. It appears quite manifest, from the terms of the statute of 1840, c. 87, §§ 4, 5, that, from the provisions allowing exceptions in matters of law, and appeals, where there is any error on the face of the record, judgments on pleas in abatement are expressly excepted. This point is determined by previous decisions. *Browning v. Bancroft*, 5 Met. 88; *Sawyer v. Pratt*, 9 Met. 170.

Exceptions dismissed.

THE CITY OF BOSTON vs. FREDERIC W. CAPEN & another.

A bond, given by the master or owner of a vessel arriving within this state with alien passengers on board, to the boarding officer duly appointed by the city of Boston under St. 1837, c. 238, § 1, in the penal sum of sixty five thousand dollars, reciting that sixty five of such alien passengers, named therein, have been landed and now reside in the city of Boston, who, in the opinion of the overseers of the poor of the city are likely to become chargeable to the commonwealth for their support, and conditioned to indemnify the city and commonwealth from all charge and expense which may arise from such passengers for the term of ten years, does not conform to St. 1837, c. 238, § 2; (1.) Because it is in the sum of as many thousand dollars as there are passengers, and not in the sum of one thousand dollars for each passenger; (2.) because it does not show that the boarding officer made the examination, required by the statute, to ascertain whether any of the passengers came within the description of persons for whom he had a right to exact a bond; and (3.) because it does not show that the passengers named were lunatic or indigent persons, incompetent, in the opinion of the boarding officer, to maintain themselves, or who had been paupers in any other country; and if it is not proved, in an action brought on such bond, that there were in fact passengers for whom he could legally exact a bond, the bond is void.

THIS was an action of debt on a bond in the penal sum of sixty five thousand dollars, executed by the defendant, Capen, as principal, and the other defendant, William M. Otis, as surety, to the plaintiffs, on the 16th of August, 1847, the condition of which was as follows:

"Whereas the said Otis, as master of the ship Georgia, and having her under his command, has lately, to wit, on the 15th day of August, arrived at the city of

Boston v. Capen.

Boston, from Liverpool, having with him as passengers on board of said ship, the following persons, who have no legal settlement in the commonwealth of Massachusetts, to wit:” (here the names of sixty-five persons are enumerated,) “which said passengers have been landed, and now reside in said Boston, and whereas, in the opinion of the overseers of the poor of said city of Boston, the said passengers are liable to become chargeable for their support to the said commonwealth, of which the said Otis has been duly notified by the mayor of said city: Now if the above bounden Capen shall well and truly indemnify and save harmless the said city, as also the said commonwealth, from all manner of charge and expense which may arise from said passengers, each and every of them, for and during the term of ten years, then this obligation to be null and void, otherwise to be and remain in full force and virtue.”

At the trial, which was in this court, before *Fletcher, J.*, it was in evidence, that the persons named in the condition of the bond, were landed from the ship *Georgia*, at Deer Island, in the harbor of Boston, being sick and destitute, and were there for sundry periods of time, and became a charge upon, and were supported by the plaintiffs. One of these persons was discharged as cured, and went up to the city for employment, but subsequently returned, being unable to find employment.

Jotham B. Monroe, the superintendent of alien passengers for the port of Boston, called as a witness for the plaintiffs, testified that on the arrival of the ship *Georgia* at the quarantine ground, near Deer Island, he went on board and introduced himself to the master, as the person appointed by the city authorities, under the act of 1837, c. 238, to examine passengers, and gave the master a copy of the act; that having mustered and examined the passengers, he informed the master, that there was a certain number, for whom two dollars a head must be paid, and that for the residue, being paupers, a bond must be given. The master answered, that his owner, the defendant Capen, would meet all the necessary demands. The superintendent then stated to the master that, by the quarantine regulations, the ship could not go to town until the port physician had given a certificate that she was thoroughly cleansed, and suggested to him the privilege of having those of his passengers, who were not diseased, landed at the Island Point. Those who were sick were placed in the hospital, and the ship cleansed at once. The superintendent told

the master, that the expense of landing these passengers, and sending them up to the city, would be \$100. The master chose to consult the owner, who subsequently agreed with the superintendent, that the latter should land all the passengers on the island, so that the vessel might be cleansed at once, and to pay the expense, as above, which he subsequently did. He also paid the head money on those passengers designated by the superintendent. No bond was required in those cases where head money was paid. The passengers were all landed before the bond was delivered to the witness. The witness further stated, that he had never refused to land passengers until a bond was given; that, in taking the bond in suit, he acted as the superintendent of alien passengers, under the law above referred to; that he alone acted for the city; that he filled up the bond and saw the master execute it; and that it was his impression, that the master took it to the owner, who executed it and brought it to him.

Upon these facts, it was agreed that the case should be submitted to the court, who were to enter such judgment, as the law should require, or direct the case to be tried by a jury, if they should think proper; and if the judgment should be for the plaintiffs, to appoint an assessor to ascertain the amount for which it should be rendered.

P. W. Chandler, city solicitor, for the plaintiffs. 1. The bond, being a sealed instrument, can be inquired into only for fraud or duress, and the obligors are estopped from showing any failure of consideration. *Sumner v. Williams*, 8 Mass. 162, 200; *Page v. Trufant*, 2 Mass. 159; *Dale v. Roosevelt*, 9 Cowen, 307; *Dorlan v. Sammis*, 2 Johns. 179, note; *Dorr v. Munsell*, 13 Johns. 430; *Stephens v. Crawford*, 1 Kelly, 574, 582. 2. The bond is valid and binding under *St. 1837, c. 238, § 2*. It is in accordance with the provisions of the statute. The examination was made by the proper officer; persons were found coming within the description of the statute; and the bond was voluntarily entered into by the obligor, having learned the existence and provisions of the statute. The consideration of the bond is the privilege of landing such passengers as the laws require to be bonded, on the one part,

and on the other the protection of the city against the support of foreign passengers. The statute is constitutional; *Norris v. Boston*, 7 Howard, 283, 410, 414, 457, 468, 469, 518; *License Cases*, 5 Howard, 504, 582, 589; and the privilege of landing passengers, granted by the superintendent, was therefore a legal consideration. There was a substantial compliance with the requirements of the statute, though the bond, having been executed by the master before, was not delivered to the superintendent until after the passengers had been landed.

The giving of the bond was voluntary, because the passengers were landed before the bond was executed by the owner of the vessel. Even if the bond had been required before the passengers were landed, it would be a voluntary act, and in the nature of the payment of money, which a party cannot recover back, although unjustly demanded. It is well settled, that if a party, with full knowledge of the facts, voluntarily pay a demand urgently made on him, and threatened or attempted to be enforced by legal proceedings, he cannot consider the money as paid by compulsion, and recover the same back again, although he protested at the time against his responsibility; unless there be fraud and a knowledge of the injustice of the claim on the part of the person enforcing it.* *Colwell v. Peden*, 3 Watts, 327; *Elliott v. Swartwout*, 10 Peters, 137; Chit. Con. (5th Amer. ed.) 633.

A larger penalty, or the insertion of additional words, not mentioned or required by the statute, does not invalidate the bond. The penalty was properly fixed at \$65,000. But if the penalty is too high, the bond is still good for \$1,000. *Collins v. Gwynne*, 7 Bing. 423, 9 Bing. 544, 2 Moore & Scott, 640; *Norden v. Horsley*, 2 Wils. 69. 3. The bond is good at common law. *Baker v. Haley*, 5 Greenl. 240; *Winthrop v. Dockendorff*, 3 Greenl. 156; *Burroughs v. Lowder*, 8 Mass. 373; *Justices of Christian v. Smith*, 2 J. J. Marsh. 472; *Hoy v. Rogers*, 4 Monr. 225; *Cobb v. Curtis*, 4 Littell, 235; *Hall v. Cushing*, 9 Pick. 404; *Sanders v. Rives*, 3 Stew. 109; *United*

* See *Benson v. Monroe*, *Post*, 125.

Boston v. Capen.

States v. Brown, Gilpin, 155, 179; *State Bank v. Twitty*, 2 Hawks, 1; *Vroom v. Smith*, 2 Green, N. J. 479; *Anderson v. Foster*, 2 Bailey, 500; *Branch v. Elliot*, 2 Dev. 86; *Justices of Cumberland v. Armstrong*, 3 Dev. 284, 286; *Governor v. Matlock*, 2 Hawks, 366; *Johnston v. Gwathney*, 2 Bibb, 186; *Stevens v. Treasurers*, 2 McCord, 107; *Treasurers v. Bates*, 2 Bailey, 362, 376; *State v. Mayson*, 2 N. & McC. 425; *Clarke v. Ray*, 1 Har. & J. 323; *Union Bank of Maryland v. Ridgely*, 1 Har. & Gill, 324; *Stephens v. Crawford*, 1 Kelly, 574.

B. R. Curtis, for the defendants. The bond in this case is void. 1. Because though demanded and received by the superintendent of alien passengers *colore officii*, it was not taken in the course of his legal duties, nor justified by any authority of his office. *Churchill v. Perkins*, 5 Mass. 541; Story on Agency, § 307; *U. States v. Morgan*, 3 Wash. C. C. 10. And the superintendent not being authorized to accept such a bond for and to the city, there was no legal delivery. 2. Because it was given in execution of and as the consideration for a compact to permit the passengers to land without complying with the law, which was expressly forbidden by the statute. 3. Because it varies from the requisitions of the statute, and imposes on the obligee greater burdens than the law allows. *Hall v. Cushing*, 9 Pick. 404; *Commonwealth v. Laub*, 1 Watts & S. 261; *U. States v. Gordon*, 1 Brook. 190. 4. Because, the master having agreed to give the bond in order to get the passengers landed, the execution of it afterwards, in pursuance of such agreement, was in point of law under duress and not voluntary. Besides; there is a distinction between an action to recover back money paid under a mistake of law, and an action to enforce a promise or obligation entered into under a similar mistake. *May v. Coffin*, 4 Mass. 341; *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, 7 Mass. 483.

The statute in question is not constitutional, within the decision of the supreme court of the United States in *Norris v. Boston*, 7 Howard, 283.

BIGELOW, J. The view which the court have taken of this case renders it unnecessary to consider several of the ques-

tions-discussed in argument by the counsel. It is admitted that the bond, on which the plaintiffs claim to recover, was required of the defendants, and given by them, under the second section of the statute of 1837, c. 238, relating to alien passengers; by which it is provided that, "if, on examination, by the boarding officer, of any vessel, there shall be found among the passengers any lunatic, idiot, maimed, aged or infirm persons, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the owner, master, consignee or agent of such vessel shall have given to the city or town a bond in the sum of one thousand dollars, with good and sufficient surety, that no such lunatic or indigent passenger shall become a city, town or state charge, within ten years from the date of said bond."

The first question which presents itself under this section of the statute is, for what classes of passengers is the boarding officer authorized to require a bond. It seems to be quite clear, that they are comprehended under two descriptions. First, for all those who, on examination, in the opinion of the boarding officer, are incompetent to maintain themselves by reason of their being lunatics, idiots, maimed, aged or infirm. Secondly, for those who have been paupers in a foreign land; that is, for those who have been a public charge in another country; and not merely destitute persons, who, on their arrival here, have no visible means of support; the word "paupers" being used in this connection in its legal, technical sense. For these two descriptions of passengers, and for these only, can a bond be required. All others are included in the third section of the act, and are made liable to the payment of the capitation tax or head money therein provided. Under the second section, therefore, it is not sufficient that, in the opinion of the boarding officer, some of the passengers are poor and destitute, and so likely to become chargeable to the city, town or state; but he must be satisfied that they come within the two descriptions of persons above named, before he is authorized to require a bond from the master or agent of the vessel.

And there was an obvious reason for thus restricting the classes of passengers to which this provision was applicable. It is only those who, by reason of some permanent disability, are unable to maintain themselves, or who had actually been a public charge in another country, that might become a heavy and long continued charge to the city, town or state, in this country; and for these the statute requires a bond to be given, with a penalty sufficient in amount to guard against loss. But the tax of two dollars on each passenger was undoubtedly deemed by the legislature a sufficient provision to indemnify the public against any charges which might be incurred for the relief or support of those who were not permanently disabled, and who had never been paupers prior to their arrival here.

The next question material to be considered relates to the bond which the officer was authorized to require under the second section. It was urged at the argument, that the meaning of the statute was, that the bond, in all cases, was to be for one thousand dollars only, without regard to the number of passengers on board of a vessel for whom a bond could properly be required. But this does not seem to be a reasonable construction. The language of the statute is, "No such passenger" shall be permitted to land, unless a bond shall be given that "no such passenger" shall become a public charge; clearly indicating, that a bond was to be given for each passenger in the sum of one thousand dollars. Besides; it cannot be supposed that the statute was intended to operate so unequally. For the effect of the construction contended for would be, that the owner or consignee, having one passenger on board of a vessel coming within the terms of the second section of the act, would be required to give a bond in the same sum as one whose vessel had on board one hundred passengers of the same description. Such a construction, too, would in many cases defeat the main purpose for which the statute was intended; because it is manifest, that a bond in the sum of one thousand dollars would very often be a security wholly disproportionate to the liability of the city, town or state, to relieve and support any consi-

derable number of persons for so long a period as ten years.

The statute, therefore, authorizes the boarding officer to require a bond in the sum of one thousand dollars for each passenger coming within the description of persons named in said second section. He cannot take a bond in a less sum; he ought not to require one in a larger sum. Now, by reference to the bond on which the plaintiffs rely, it will be seen that it does not conform to the statute in several material particulars. In the first place, it is a bond in the sum of sixty five thousand dollars, by which the obligors are bound in that sum to "indemnify and save harmless the city and also the commonwealth from all manner of charge and expense which may arise from said passengers, each and every of them, for and during the term of ten years." The effect of this is to make the parties liable to pay any sum within the penalty, however large, for each passenger, instead of restricting the liability to one thousand dollars. In the second place, it does not appear by the recital in the bond, that the boarding officer made any examination of the passengers, as he is required to do by the statute, to ascertain whether any of them came within the description of persons for whom he had a right to exact a bond; but it is set out in the bond only, that, in the opinion of the overseers of the poor of the city of Boston, certain persons were liable to become chargeable for their support to the commonwealth; a statement wholly immaterial and irrelevant. And, lastly, it does not appear by the bond, that there were any passengers on board of said vessel, who came within the provisions of said section, and for whom the boarding officer had a right to require bonds. The result is, therefore, that the bond does not conform to the statute, nor does it show that the boarding officer had any right to require a bond of the master or owner of the vessel.

On referring to the testimony of Monroe, the agent and examining officer, and the only witness who testified at the trial, it is not shown that, on examination, he actually found any passengers on board said vessel, for whom he could legally

require bonds. All he says on this point is, that, on examining the passengers, he informed the master of the vessel that there was a certain number for which two dollars must be paid, and that for the residue, being paupers, a bond must be given. He does not say, that, on examination, he found any lunatic, idiot, maimed, aged or infirm persons, incompetent, in his opinion, to maintain themselves, nor that any of them had been paupers in a foreign country. The statute, as has been before said, did not authorize him to require a bond for those who were then poor and destitute, without means of support; but only for those who had been paupers in another country. We cannot infer from his testimony, that any such were on board the vessel. For aught, therefore, that appears by the bond or the evidence in the case, the boarding officer had no right to require the bond to be given. It was, then, a bond exacted by a public officer, purporting to act in the discharge of his duty, but having in fact no legal authority to require it. It stands, in other words, as a bond given to one who had no lawful authority to take it, and comes within that class of cases in which it has been held that a bond, taken by a public officer when he had no authority to require it, is illegal and void. *United States v. Tingey*, 5 Peters, 115, 129; *Purple v. Purple*, 5 Pick. 226; *Thompson v. Lockwood*, 15 Johns. 256.

It was suggested at the argument, that it appeared by the evidence that the bond in this case was voluntarily given by the defendants, and was not required of them under the provisions of the statute; because the boarding officer, by an arrangement with the master, permitted the passengers to land before the bond was delivered to the plaintiffs. But we think this is not a proper inference from the facts reported. The arrangement for landing the passengers was made after the officer had informed the master the bond must be given, and after he had agreed to comply with the requisition. It cannot be pretended that the passengers would have been permitted to land, if this arrangement had not been made. We think that the landing of the passengers and giving the bond are to be regarded as parts of one and the same transaction; and that the mere

 Benson & another v. Monroe.

fact that the former took place before the latter, does not authorize the inference that the bond was given voluntarily, and was not exacted under legal compulsion.

There is no doubt of the soundness of the general principle of law contended for by the learned city solicitor, that a bond given in pursuance of a statute, though not strictly conformable to it, and containing conditions other and more onerous than those authorized by statute, may be good at common law, and to a certain extent binding on the parties; but it will be found that, in all the cases cited, in which this doctrine is recognized, the obligee was lawfully empowered to require a bond, and the obligor was lawfully bound to give one. But in the case at bar, the officer had no right to require a bond, and the obligors were not legally bound to give one.

Upon the question whether, if it had appeared by the evidence in the case that there were passengers on board the vessel coming within the terms of the second section of the act of 1837, c. 238, this bond would then have been valid and binding on the parties, the court do not deem it necessary to express an opinion; but it may be doubtful whether any evidence would be competent to contradict or control the recital in the bond, describing the class of passengers for which the bond was taken. See *Cutler v. Dickinson*, 8 Pick. 386.

Plaintiff nonsuit.

WILLIAM R. BENSON & another vs. JOSEPH B. MONROE.

If a party, with full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there is fraud in the party enforcing the claim, and a knowledge on his part that the claim is unjust; although the party paying protests at the time that he is not answerable, and gives notice that he shall bring an action to recover the money back.

A vessel arrived at Boston in 1847, with alien passengers on board; after the pas-

Benson & another v. Monroe.

sengers were landed, the master refused to pay the head money, of two dollars for each of one hundred and forty passengers, demanded by the superintendent of alien passengers, under the statute of 1837, c. 238, § 3, which had been decided by this court to be constitutional and valid; whereupon the overseers of the poor commenced a suit, (under Rev. Stat. c. 46, § 28, and St. 1837, c. 238, § 6,) against the owners of the vessel to recover the penalty of two hundred dollars for each passenger, and attached the vessel in the sum of thirty thousand dollars: The owners thereupon paid the head money demanded, and costs, under protest, and with notice that they intended to sue to recover it back: The statute of 1837, c. 238, § 3, was afterwards decided by the supreme court of the United States to be unconstitutional and void. It was held, that the owners could not maintain an action to recover back the head money and costs so paid.

THIS was an action of assumpsit, by the plaintiffs, as the owners of the ship *Washington*, to recover back the sum of \$398.25, paid under protest by Benson, one of the plaintiffs, and master of said ship, on the 10th of January, 1848, to the defendant, as the superintendent of alien passengers for the city of Boston, appointed by the mayor and aldermen thereof, under the statute of 1837, c. 238. The action was tried before *Bigelow, J.*, in the court of common pleas, when the following, among other facts, appeared.

On the 9th of December, 1847, the ship *Washington*, of Richmond, in Virginia, where the plaintiffs resided, prosecuting a voyage from Liverpool to Staten Island, (to land passengers,) and from thence to James River, came in collision with the ship *Mary Frances*, between George's and Nantucket Shoals, and put into Boston, in consequence of the injuries she received. She had on board one hundred and ninety alien passengers.

When the *Washington* arrived at quarantine, off Deer Island, the defendant went on board, and explained to the master the city ordinance prohibiting vessels with disease on board from going to the city; and some conversation also took place, relative to sending the passengers to New York in a vessel, which the master thought would be too expensive. The plan of landing the passengers on the island, and letting the ship be cleansed and proceed to the city, was talked of. The defendant informed the master that the expense of so landing the passengers, and taking care of them, would be about \$100, which the master agreed to pay. The passengers

were accordingly landed, (a portion of them being taken at once to the hospital,) and remained on the island several days, and the ship was cleansed and went up to the city. When the ship was repaired, she proceeded to sea, without taking any of the passengers previously landed. The defendant, under the statute before mentioned, demanded head money for one hundred and forty of the passengers; but whether the demand was made before or after the passengers were landed, did not appear.

The master and consignees having refused to pay the head money demanded by the defendant, on the ground that they were exempted therefrom by the provisions of *St. 1837, c. 238, § 5*, as having made the port of Boston in distress, a suit was commenced against the owners on the 8th of January, 1848, by the overseers of the poor of Boston, to recover penalties to the amount of thirty thousand dollars, for landing passengers in contravention of the *Rev. Sts. c. 46, § 28*, and *St. 1837, c. 238, § 6*; and on this suit the ship was attached. On the 11th of January, the plaintiffs, by their attorney, paid the defendant, in settlement of this suit, the sum of \$398.25, which included \$280 head money, \$100 for landing passengers, and the costs of the suit, for which the defendant gave the plaintiffs' attorney a receipt. And on the next day, the defendant, acting as the agent of the overseers, caused the attachment of the ship to be dissolved.

When the money was paid, the plaintiffs' attorney declared that it was paid under protest; that the plaintiffs would sue to recover it back; and the defendant, as the agent of the overseers, agreed, as a condition to the payment, to have the attachment dissolved, and also that a suit was to be brought for the recovery of the money, to test the validity of the claim. The defendant was desired, at the same time, by the plaintiffs' attorney, to sign a paper acknowledging the payment of the money by the plaintiff Benson, under protest, and with a reservation of his legal rights, and promising to repay the same to Benson, in whole or in part, on a suit to be brought within thirty days, if it should appear that he was not legally bound to pay the same to the defendant; but the defendant refused to sign the paper.

Benson & another v. Monroe.

The presiding judge instructed the jury, that the third section of St. 1837, c. 238, authorizing the collection of head money, was unconstitutional and void, and that the demand thereof by the defendant, was illegal; and upon the question, whether the money paid could be recovered back in this action, he instructed them that if the defendant demanded of Benson \$280 head money, for alien passengers on board the Washington, and Benson refused to pay the same, but landed the passengers, and the overseers of the poor commenced an action against the owners of the ship, to recover thirty thousand dollars, for a violation of law in landing these passengers, and Benson then agreed to pay the head money, on condition that the defendant, acting as the duly authorized agent of the overseers of the poor, would procure a discharge of the suit, and for that purpose only, and the defendant did procure such discharge, then the plaintiffs could not recover back the sum paid, even though they protested against paying it, and declared their intention to sue for it, unless the jury were satisfied that the defendant, at the time of paying the money, agreed with the plaintiffs to hold the money, in which case the plaintiffs could recover the money of him, in case the payment should be held to have been unlawfully exacted.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

W. Sohier and *J. Lowell*, for the plaintiffs. 1. The ruling is incorrect. The circumstances of the case show such compulsion, duress and inequality, as will enable the plaintiffs to recover the head money paid by them under protest. And the fact, if warranted by the evidence, that such payment was made merely to relieve the compulsion or remove the duress, will not destroy, but only illustrate their rights. The parties were not on an equal footing. The overseers of the poor had it in their power to enforce the suit for \$30,000, on which they had already attached the plaintiffs' vessel. And this right gave them an unequal and superior position. *Valpy v. Manley*, 1 Man. G. & S. 594; *Carter v. Carter*, 5 Bing. 406; *Parker v. Great Western Railway*, 7 Man. & G. 253, 293; *Close v. Phipps*, 7 Man. & G. 586; *Ashmole v. Wainwright*, 2

Ad. & El. N. R. 837; *Dew v. Parsons*, 2 B. & Ald. 562; *Pitt v. Coomes*, 2 Ad. & El. 459; *Snowdon v. Davis*, 1 Taunt. 359; *Richardson v. Duncan*, 3 N. H. 508; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181; *Norris v. Boston*, 4 Met. 282, 284. All, or nearly all, the modern English cases, turn upon the question whether the payment was, in fact, voluntary. There is no pretence that it was so in this case.

2. The payment of head money now in question was demanded and made by and under the authority of a law (*St. 1837, c. 238*), which has *since* been pronounced unconstitutional. At the time the payment was made, the law was considered valid and would have been enforced by our courts; having been decided to be constitutional by this court, in *Norris v. Boston*, 4 Met. 282; but at the January term, 1849, of the supreme court of the United States, more than a year after this payment was made, that decision was reversed, and the law was declared invalid. 7 Howard, 283. It must therefore be an exception to the rule, that money paid under a mistake of law, cannot be recovered back; for to extend that rule to this case, would be to hold, that a private individual is obliged to be wiser than this court. It is analogous to the payment of money on a judgment which is afterwards reversed. See 1 Steph. N. P. 357; *Elliott v. Swartwout*, 10 Pet. 137; *Smith v. Sleep*, 12 Mees. & Welsb. 588.

P. W. Chandler, city solicitor, for the defendant. The plaintiffs cannot recover back the head money paid by them. 1. Because the payment was made with a full knowledge of all the facts in the case, and ignorance of the law will not entitle the plaintiffs to recover. The constitution is the supreme law of the land, and whatever is not in accordance with it, whether it be an act of congress or of one of the state legislatures, is void and not law. *Marbury v. Madison*, 1 Cranch, 137, 176; 1 Kent Com. 449. The constitution and the laws of congress are not foreign laws and therefore regarded as matters of fact, but domestic and supreme in all the states. 1 Greenl. on Ev. §§ 489, 490, and cases there cited. If, then, the plaintiffs knew all the facts in the case, and were ignorant of the law only, and if the statute requiring the payment was

void from unconstitutionality, the right to inquire into that question was waived by payment, and the plaintiffs cannot recover. *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres* 5 Taunt. 143, 152, 162; *Lowry v. Bourdieu*, 2 Doug. 468, 471; *Bize v. Dickason*, 1 T. R. 285; *Bromley v. Holland*, 7 Ves. 3, 23; *Elliott v. Swartwout*, 10 Pet. 137; *Mowatt v. Wright*, 1 Wend. 355; *Clarke v. Dutcher*, 9 Cow. 674; *Ladd v. Kenney*, 2 N. H. 340; *Haven v. Foster*, 9 Pick. 112.

2. Because the payment was voluntary, and not under such compulsion of law as will entitle the plaintiffs to recover the money back. The rule is, that whenever a party has an opportunity to plead and avail himself of a legal defence, and pays money, though under protest, he cannot recover it back; for the payment is not compulsory but voluntary. But where money is paid to release goods, or save them from execution, or any other summary process, and there is no opportunity to plead and defend, it may be recovered back. *Marriott v. Hampton*, 2 Esp. R. 546; *Knibbs v. Hall*, 1 Esp. R. 84; *Brown v. McKinally*, 1 Esp. R. 279; *Hamlet v. Richardson*, 2 Moore & Scott, 811; *Milnes v. Duncan*, 6 B. & C. 671, 679; *Rawson v. Porter*, 9 Greenl. 119; *Elliott v. Swartwout*, 10 Pet. 137; *Bates v. New York Insurance Co.* 3 Johns. Cas. 238; *Chase v. Dwinal*, 7 Greenl. 134; *Richardson v. Duncan*, 3 N. H. 508; *Ripley v. Gelston*, 9 Johns. 201; *Fulham v. Down*, 6 Esp. R. 26 n; *Payne v. Chapman*, 4 Ad. & El. 364; *Goodman v. Sayers*, 2 Jac. & W. 249; *Longchamp v. Kenny*, 1 Doug. 137; *Lindon v. Hooper*, Cowp. 414; *Preston v. Boston*, 12 Pick. 7, 13; *Amesbury Manufacturing Co. v. Amesbury*, 17 Mass. 461; *Torrey v. Millbury*, 21 Pick. 64; *Cobb v. Curtiss*, 8 Johns. 470; *White v. Ward*, 9 Johns. 232; *Wright v. Tower*, 1 Browne, Appx. 1; *Colwell v. Peden*, 3 Watts, 327; *Astley v. Reynolds*, 2 Stra. 915; *Forbes v. Appleton*, 5 Cush. 115. In this case an opportunity to plead and defend was given, by the suit which was brought by the overseers of the poor.

3. Because the payment was made under a contract; and if the consideration has failed or been adjudged illegal, the rule "*in pari delicto potior est conditio possidentis*" applies. The plaintiffs and the commonwealth may be regarded as in-

dividuals contracting under the constitution of the United States; the commonwealth granting the privilege of landing passengers, and the plaintiffs paying for that privilege head money. If the commonwealth had no power to grant the privilege or require any payment for it from the plaintiffs, and if the making of such an agreement was prohibited by the constitution, yet the plaintiffs waived the illegality of the contract, or while its legality was in doubt paid money under it, and cannot recover it back. *Drummond v. Deey*, 1 Esp. R. 152; *Andree v. Fletcher*, 3 T. R. 266; *Vandyck v. Hewitt*, 1 East, 96; *Howson v. Hancock*, 8 T. R. 575; *Bean v. Jones*, 8 N. H. 149; *Pearson v. Lord*, 6 Mass. 84. The distinction between *mala in se* and *mala prohibita* is now denied. *Farmer v. Russell*, 1 Bos. & Pul. 296; *Aubert v. Maze*, 2 Bos. & Pul. 371; *Clarke v. Shee*, Cowp. 197; *Mitchell v. Cockburne*, 2 H. Bl. 379.

METCALF, J. The court deem this a plain case. It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact, that the party, so paying, protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay. This circumstance distinguishes such a case from most of those which were cited for the plaintiffs. As was said by Gibbs, J., in *Brisbane v. Dacres*, 5 Taunt. 152, the party has an option, whether to litigate the question, or submit to the demand and pay the money. See also *Preston v. City of Boston*, 12 Pick. 13, 14; *Rawson v. Porter*, 9 Greenl. 119.

In *Brown v. McKinnally*, 1 Esp. R. 279, a party, who was sued for old iron sold and delivered, paid the sum demanded, objecting, at the time, that the iron was not such as he con-

tracted for, but was of an inferior quality and less value, and giving notice to the vendor that payment was made without prejudice, and that a suit would be brought to recover back the overplus thus paid. On his bringing such suit, Lord Kenyon decided that it could not be maintained, and said, that to allow it would be to try every question twice; that the same legal ground, which would entitle the plaintiff to recover in that suit, would have been a good defence to the suit brought against him by the defendant; and that the plaintiff should have made his defence to that suit. This decision has been repeatedly recognized and confirmed by the courts in England. Two or three cases only need be cited. In *Hamlet v. Richardson*, 9 Bing. 644, the plaintiff had paid a certain sum of money to the plaintiff, after action brought, with knowledge of the facts on which the demand was founded; and it was held that he could not recover it back. Tindal, C. J., referred to *Brown v. McKinally*, and also to *Milnes v. Duncan*, 6 Barn. & Cres. 679, where Holroyd, J., said, that money, paid after legal proceedings were instituted, could not be recovered back, if there was no fraud in the party receiving the money. The same doctrine was fully recognized by the court of King's Bench, in *Duke de Cadaval v. Collins*, 4 Adolph. & Ellis, 858, and 6 Nev. & Man. 324. In that case, it was decided that if a party, knowing that he has no cause of action, fraudulently arrests another, who pays money to get rid of the pressure of the arrest, the money so paid may be recovered back; on the ground that legal process was colorably and fraudulently used to enforce a fictitious demand. This principle seems to have been applied in the case of *Richardson v. Duncan*, 3 N. Hamp. 508, cited by the plaintiffs' counsel. But the case at bar does not fall within this principle. Here was no fraud; no attempt to plunder the plaintiffs by color of legal process. They should have contested the demand made on them, in the suit that was instituted against them; and having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge, or means of knowledge, of all the facts of their case, they cannot now be permitted to disturb that adjustment.

Judgment on the verdict for the defendant.

JOHN T. G. PIKE vs. CHARLES W. BROWN.

When a deed of land, subject to a mortgage previously made by the grantor, expresses that the sum secured by the mortgage is part of the consideration of the deed, and that the deed is made on condition that the grantee shall assume and pay the mortgage debt and the interest thereon, as they severally become due and payable; and the grantee enters upon and holds the estate, and does not pay the interest when it falls due; the grantor, after paying the interest on demand of the mortgagee, may maintain assumpsit against the grantee to recover the amount so paid.

WRIT OF REVIEW. The case was argued at the last November term, by *I. W. Richardson*, for the plaintiff in review, and by *H. C. Hutchins*, for the defendant in review. The opinion of the court exhibits all the facts.

SHAW, C. J. This case comes up on a writ of review, granted on petition, to enable the plaintiff in review, defendant in the original action, to correct and set aside, if he can, a judgment recovered by Brown against him.

The original action was assumpsit to recover a sum of money, alleged to be due to him from the original defendant on these grounds: Brown, by deed poll, expressed to be in consideration of \$4000, conveyed an estate to Pike, designated as a house and lot on South Cove, and described as being subject to a mortgage, to secure Brown's note to one Walker, for \$2,825, payable in four years, with an amount of interest specified, payable semiannually; "which said sum is part of the consideration before named, and this deed is on condition that said Pike shall assume and pay said note and the interest thereon, as they severally become due and payable." It appears by the case, that Pike entered upon and took possession of the estate conveyed, and held it till a half year's interest became due; he did not pay it, but Brown, being liable for it on his note, was called upon to pay it and did pay it to the mortgagee, and brought this action of assumpsit to recover it.

The court are of opinion that this action can be maintained. The principle is well settled, that where one, by deed poll,

grants land, and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment; or perform such duty, and not having sealed the instrument, he is not bound by it as a deed; but it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie.

The most common and familiar case is that of a lease, or the creation of a term by deed poll, one of the stipulations of which is, that the lessee pay certain rents at certain times. The lessee does not contract by deed, but from the rent reserved the law implies a promise. It seems impossible to distinguish this case from that of *Goodwin v. Gilbert*, 9 Mass. 510. The counsel for the defendant, supposed that the marginal note to that case announced a principle not warranted by the case. We can see no such discrepancy. The case stated certain facts and circumstances, upon which it was contended that the promise arose; the marginal note announced the general principle to be extracted from the case. The statement of the general principle would, of course, avoid all the particular circumstances, which were immaterial, and could not affect the result. This appears to be the only discrepancy between the marginal note and the detailed case. This case was referred to, with approbation, in a later case, in which the general principle above mentioned is restated. *Felch v. Taylor*, 13 Pick. 133. That was the assignment of a lease; this is the transfer of an equity of redemption. Each is an interest in land, and each is transferred, by deed poll, to an assignee, on the terms of paying money or doing some duty. There it was to pay money to a third person, which the grantor had covenanted to pay; here it was to pay the principal and interest of the grantor's note, and exonerate him from such payment.

Again; if we look at the intention of the parties, it seems to us the result is the same. The deed was in form not the

conveyance of an equity of redemption, but a conveyance of the estate, though, in legal effect, it conveyed an equity of redemption. The consideration for the entire estate was \$4000, of which Brown's mortgage to Walker was a part, which the defendant assumed and undertook to pay, as part of such consideration. Such payment, when made according to such stipulation, would relieve the plaintiff from his personal obligation to Walker and release the estate from the lien upon it. A stipulation to pay my debt, on a valuable consideration moving from me, accepted by me, in place of so much money, is a promise to me, to indemnify me, and to reimburse me, if, not complying with his undertaking to pay it, he leaves me liable on my note, which I pay on demand.

It was urged on the consideration of the court, that this was a condition affecting the estate, and not creating a personal liability; and that if the grantee failed to perform the condition, the grantor's only remedy was a forfeiture. We think this is not so. If a condition at all, it is a condition subsequent, which might operate as a breach, and warrant a reëntry for condition broken. But if the grantor has this remedy, it is collateral only, and far from being adequate. Take again the case of a lease by deed poll, the lessee "yielding and paying" rent, &c. These words are held to constitute both a condition and an obligation. It would afford a poor remedy, if, after the enjoyment of the estate by the lessee for several terms, say years or quarters, the lessor could only take the estate back again. No; all such words are to be construed according to the subject matter, and if they are such as ordinarily imply stipulation or undertaking, they create an implied promise, although they are also words of condition. In *Goodwin v. Gilbert*, the words in the deed poll, in which the duty was reserved, are not given; but in the case last cited, of *Felch v. Taylor*, 13 Pick. 133, the words in the devise, which stands on the same footing with a deed poll, were "upon condition that the said Daniel do pay," &c., and afterwards in the deed of the devisee to a third person, "excepting same condition;" it was held, in both instances, to create a debt or duty on which assumpsit would lie.

Holbrook v. Jackson & another.

It was insisted, that this promise, if it existed at all, was a promise to pay the debt of another, and so void by the statute of frauds, if not made in writing; also that it concerned real estate, and so was void under another clause of the same statute. We think neither objection tenable. Although the consideration of this promise was a conveyance of real estate, it was a consideration past and executed, and the promise remained a simple obligation to pay money. As to the other objection, that it was a promise to pay the debt of another, the substance of the contract with the plaintiff was on a consideration moving from him, to pay his debt, for his benefit, and to exonerate him, and was no less a direct promise to the plaintiff, because, in the performance of it, it would satisfy a debt due to another. Besides; promises implied by law are not within the statute.

Judgment affirmed, with additional interest and costs of review.

HENRY M. HOLBROOK vs. PATRICK T. JACKSON & another.

It is not necessary to the validity of proceedings in insolvency, instituted on the petition of the debtor, that there should be a formal adjudication by the master in chancery, or commissioner, before issuing the warrant, of the debtor's inability to pay all his debts, of his willingness to assign all his property for the benefit of his creditors, or of the fact that the debts due from him amount to the sum required by the statute.

On the trial of an action, brought by a mortgagee against the assignee in insolvency of his mortgagor, to recover the property mortgaged, in which the defendant undertakes to avoid the mortgage as being made for the purpose of giving an unlawful preference, the admission of the schedules of debts and other papers filed in the proceedings in insolvency, only as evidence that such proceedings were had, and not as evidence of the facts stated in the papers, is no ground for a new trial.

On the trial of an action, brought against the assignee in insolvency of a mercantile firm, to recover property mortgaged by them to the plaintiff, in which the defence is placed on the ground that the mortgage was made with the intention of giving an unlawful preference, and therefore void, the books of account of the firm, verified by the testimony of one of the partners, as being in the handwriting of his copartner and of their bookkeeper, and as having been recognized and

acted upon habitually by the firm as an authentic and true statement of all their mercantile concerns, are competent evidence for the defendant, for the purpose of showing that they were, and knew themselves to be, insolvent at the time of making the mortgage.

On the trial of a cause, after one party had put in evidence certain books of account, supported by the testimony of the bookkeeper who kept them, the parties agreed to refer the books to an auditor, for the purpose of his stating the results of his examination, on the stand, to the jury, which he accordingly did. It was held, that the admission in evidence of the testimony of the auditor and his report so made, on a subsequent trial of the same cause, after the books had been rightly admitted in evidence, on other testimony than that of the bookkeeper, was no ground for a new trial, although the other party was thereby obliged to call the bookkeeper as his witness.

A mortgage, made by a debtor, who is actually insolvent, and has no reasonable cause to believe himself solvent, to secure a debt to a preëxisting creditor, who has reasonable cause to believe the debtor insolvent, is void, within St. 1841, c. 124, § 3, although the debtor at the time of making it sincerely believes himself solvent.

Particular entries, in the books of account of a mercantile firm, offered in evidence for the purpose of showing their insolvency and their knowledge of their condition at the time of making a conveyance to a preëxisting creditor, were objected to by the adverse party, solely on the ground that they were not original entries, nor proved by the clerk who made them. It was held, that the party could not, after the admission in evidence of the books, and a verdict against him, object, on a motion for a new trial, that the most important entries objected to at the trial appeared to have been made after the conveyance in question.

THIS was an action of *indebitatus assumpsit*, for goods sold and delivered, and on the common money counts, and was commenced on the 30th of October, 1847.

The plaintiff filed the following specification of his claim : "The plaintiff claims to recover of the defendants, in this case, the proceeds of the goods, wares and merchandise, mentioned in a certain mortgage deed made by Loring Norcross and Matthew F. Wood to him, dated October 20th, 1846, taken possession of by the defendants, and sold by them; also interest on all such proceeds from the time when payment was made to them by the purchasers. The said mortgage deed is the same, a copy of which was sent to the defendants by the plaintiff, inclosed in his letter to them, dated January 14th, 1847, claiming the property."

The defendants pleaded the general issue, and filed the following specification of defence : "The defendants will require

the plaintiff to make out his case in every particular. And for further matter of defence, they will rely upon their being appointed, under the insolvent laws, the assignees of the joint and several estate of Loring Norcross and Matthew F. Wood, to whom the goods, wares and merchandise, the proceeds of which are claimed by the plaintiff, belonged; and upon the mortgage deed, under which the plaintiff claims, being made contrary to the provisions of the said insolvent laws, and with the intent thereby to secure or procure payment of the pre-existing claims and liabilities of the said Holbrook, or the firm of Holbrook, Carter & Co., in violation of the said insolvent laws."

The case was tried in this court, before *Fletcher, J.*, from whose report thereof it appeared to be as follows:

The defendants admitted the execution of the mortgage deed, which purported to be given to indemnify the plaintiff against his liability on three promissory notes of Norcross and Wood, of the same date, which, as the deed recited, the plaintiff had indorsed, at their request, for their accommodation. It was proved, that these notes were severally protested for non-payment by the makers, and upon notice to the plaintiff, as indorser, were paid by him.

It was further proved by the plaintiff, that the defendants took possession of the mortgaged property and sold the same, and that after possession taken, and before the sale, the plaintiff, by letter dated January 14th, 1847, gave notice to the defendants, that he claimed the property by virtue of the said mortgage deed, of which he inclosed them a copy.

It was admitted by the defendants, that they had notice of the payment by the plaintiff of the notes mentioned in the mortgage deed, and that after the sale of the mortgaged property, and before the commencement of this action, the plaintiff demanded of them the proceeds of the same, which had come to their hands; and that they refused to pay the same to him.

The defendants offered in evidence the insolvent proceedings before the master in chancery, on the application of Norcross and Wood, which were objected to by plaintiff, but were ad-

Holbrook v. Jackson & another.

mitted. The plaintiff further objected, that the schedules of debts proved before the master were not evidence as against third persons; but all the papers were admitted, only as evidence that such proceedings were had before the insolvent court, and not as evidence of the facts stated. The warrant was in the usual form, requiring the messenger to take possession of all the joint and separate estate, real and personal, of the insolvents, (excepting that by law exempted from attachment,) and of all their deeds, books of account, and papers; and to keep the same safely, until the appointment of an assignee or assignees; and also to give public notice by advertisements, in certain newspapers designated, the first publication to be made forthwith: 1. That this warrant had issued: 2. That the payment of any debts and the delivery of any property belonging to the insolvents, to them or for their use, and the transfer of any property by them, were forbidden by law: 3. That a meeting of the creditors of the insolvents would be held at the master's office, at a time specified, for the proof of debts and the choice of an assignee or assignees. It appearing that there had been no formal adjudication of insolvency, the plaintiff thereupon insisted, that for want of such adjudication, the whole proceedings were void; but the judge ruled, for the purposes of this trial, that no such formal adjudication was necessary. No objection was made by the plaintiff, during the trial, that the defendants were not duly appointed assignees.

To sustain their specification of defence, the defendants relied on the provisions of St. 1841, c. 124, § 3, and contended that, at the time of the execution of the mortgage to the plaintiff, Norcross and Wood, being insolvent, or in contemplation of insolvency, made the mortgage, intending to give a preference to the plaintiff, for preëxisting debts or liabilities, and that the plaintiff then had reasonable cause to believe that Norcross and Wood were insolvent.

In order to establish these positions, the defendants offered evidence to prove that Norcross and Wood had, for several years, been largely indebted to the plaintiff for money borrowed of him, and that he had been liable as indorser for them to

large amounts, under two agreements, one dated February 9, 1842, the other dated July 29, 1844; that on the 10th of October, 1846, the securities held by the plaintiff did not cover Norcross and Wood's indebtedments to him, and his liabilities for them, by a large amount; and that they on that day voluntarily assigned to the plaintiff, as further security, the balances of sundry accounts due to them; that from that date a series of transactions took place between them and the plaintiff, tending to show a contemplation of, and systematic preparation for, insolvency, by the accumulation of securities in the hands of the plaintiff, and the appropriation of large portions of the moneys realized from the said mortgage notes for his benefit; that when the mortgage was executed, Norcross and Wood were largely indebted to other parties than the plaintiff; that he then had in his hands the bulk of their available notes and other receivables; that by then giving the mortgage, they placed in his hands all or nearly all their remaining property of value, and so divested themselves of the means of paying their other creditors. Other evidence on this point was introduced, but was not reported, as the judge declined to report the case as a verdict against the evidence.

The defendants, to maintain their case, proposed to introduce the books of Norcross and Wood, and, for the purpose of verifying them, offered Matthew F. Wood, one of the firm of Norcross and Wood, who testified, amongst other things, that certain books exhibited to him were in the handwriting of his partner and of Erasmus Norcross, their bookkeeper; and said, "they are the books of our firm; they are the books kept at the store, containing the entries as daily made, and accounts as kept in the course of business." On cross-examination, he stated that there was an account of profit and loss always kept and entered in the books; that he made no entries therein, and knew nothing of the entries, except that entries were made from day to day, in the course of the business of the firm, and he believed the books were regularly kept; that trial balances were taken yearly, and that he acted on these books as the books of the firm.

The plaintiff objected to the introduction of these books,

but the judge ruled that they were admissible and competent, as tending to show the knowledge of Norcross and Wood of their own condition, and also as tending to show their general state and condition as to solvency or insolvency; the weight of the evidence to be derived from the books, to be determined of course, by the jury, under all the circumstances of the case. In the course of the trial the books were examined and used by both parties, and their contents exhibited and commented on to the jury.

At a former trial of this cause, the defendants, having called Erasmus Norcross, the bookkeeper, as their witness, and put in evidence the books of Norcross and Wood with his testimony, it was agreed between the parties, that one Rogers should take the books and audit certain accounts therein, and state the results on the stand to the jury, which he did; and the defendants now offered the testimony of Rogers and his said report in evidence, which was objected to by the plaintiff, but admitted. And Rogers exhibited the results of his auditing of said accounts, verified by his testimony, and testified that the counsel and parties, and Norcross, were present, and that he had stated the account from the books of Norcross and Wood.

After the defendants had rested their case, the plaintiff called Loring Norcross, who testified that the books of his firm, which had been introduced, were kept by him or under his immediate instruction and direction, and he believed them all true, and that the schedules in insolvency were made by him therefrom, and that the entries in the books, which had been previously read to the jury, by the defendants' counsel, were true.

The judge instructed the jury that to maintain their defence, the defendants must prove that Norcross and Wood, being insolvent and knowing their situation, and in expectation or anticipation of stopping payment, made the mortgage to the plaintiff, with the intention to give him a preference for pre-existing debts over their general creditors; and that the plaintiff, at the time of taking the mortgage, had reasonable cause to believe that the mortgagors were insolvent; and that if the

Holbrook v. Jackson & another.

defendants established these points, the mortgage was void as against the other creditors.

On the question of intention, the court instructed the jury as follows: "It is maintained, on the part of the plaintiff, that, at the time when this mortgage was made, Norcross and Wood believed themselves to be solvent; that they believed themselves able to pay all their debts, and expected and intended to do so; that they intended and expected to go on with their business, anticipated no failure or stoppage, and had no intention to give a preference to Holbrook; but gave the mortgage in the regular course of business, and as a means of aiding them in carrying it on. If this was so, if the mortgage was made with no intention to give a preference, but in the regular course of business, the mortgagors expecting and intending to go on, and as a means of going on, the giving of the security, under such circumstances and with such intent, would be valid. The jury must therefore look to the evidence, and see whether these grounds of the plaintiff were supported by the evidence in the case." The defendants maintained, that an obviously absurd, or wilfully blind state of mind, wholly inconsistent with actual contemporaneous knowledge of existing facts, brought home to the debtor, would not suffice to disprove an intent to prefer; but the plaintiff insisted, that any sincere belief of the nature referred to, however mistaken, if really entertained, would disprove his intent; and upon this part of the case, the judge, in reference to these positions, left it with the jury to determine, whether, looking at the facts as they actually were at the time, judging as reasonable men, and regarding Norcross and Wood as rational beings, the jury could believe, that at the time they made the mortgage, they could expect to go on with their business, notwithstanding the declaration of Norcross as to his private views and intentions.

A verdict having been rendered for the defendants, the plaintiff moved for a new trial, on the ground that the rulings and instructions of the judge were erroneous.

R. Choate and B. R. Curtis, for the plaintiff. 1. As it appears from the insolvency proceedings that there had been

no formal adjudication of insolvency, and no adjudication of any fact, previous to issuing the warrant; for want of such adjudication the whole proceedings were void, and so the defendants were not duly appointed assignees and had no title as such. *Randall v. Barton*, 6 Met. 518; *Commonwealth v. Clark*, 2 Mass. 156, and cases there cited by the court; *The King v. Pitts*, 2 Doug. 662; *Commonwealth v. Cummings*, 2 Mass. 171; *Commonwealth v. Egremont*, 6 Mass. 491; *Inhabitants of Pownal*, 8 Greenl. 271; Bac. Ab. Bastardy, A; 2 Chit. Gen. Pract. 203; *The King v. Harris*, 7 T. R. 238; 3 Phil. Ev. 1079, 1080; *Starr v. Scott*, 8 Conn. 480.

2. The papers, purporting to be schedules of debts proved before the master, were improperly admitted in evidence. They were wholly unimportant for the purpose for which they were admitted, and being permitted to go to the jury, they necessarily had a tendency to satisfy them of the amount of the debts appearing on such schedules, and thus to prove the fact of insolvency by incompetent evidence. 1 Taylor on Ev. 233, 234, 235; Eden on Bankr. Law, 360, and cases cited; Graham on New Trials, 242 to 247.

3. The books of Norcross and Wood were improperly admitted in evidence of their general state or condition of solvency or insolvency, no sufficient evidence having been given of the truth of the entries therein. *Brewster v. Doane*, 2 Hill's (N. Y.) Rep. 537; *Baker v. Briggs*, 8 Pick. 122; Eden on Bankr. Law, 360; 1 Greenl. on Ev. §§ 115, 120; *Doe v. Turford*, 3 B. & Ad. 890. The fact that the plaintiff afterwards called the bookkeeper, and that he swore to the truth of the entries, does not cure the objection, the defendants having been enabled to make a *prima facie* case by incompetent evidence and thus avoid calling Norcross as their witness. In *Davis v. Mason*, 4 Pick. 156, a new trial was granted because the opening and close before the jury were assigned to the party not entitled to it.

4. The testimony and report of Rogers were improperly admitted. Their previous admission by the consent of the parties was in a different trial, and on a different state of facts.

5. On the question of the intention of Norcross and Wood

to give a preference, the jury should have been instructed substantially as requested by the plaintiff. *Jones v. Howland*, 8 Met. 377; *Vacher v. Cocks*, 1 B. & Ad. 145; *Green v. Bradford*, 1 Car. & K. 449. Sufficient instructions were not given on this point to enable the jury to decide it according to law.

6. It was necessary to show knowledge and consent on the part of the plaintiff in order to avoid this mortgage. That the plaintiff had reasonable cause to believe Norcross and Wood insolvent was not sufficient, the transaction on its face not being a preference, nor for a preëxisting debt, but lawful. *Baxter v. Pritchard*, 1 Ad. & El. 456; *Cook v. Caldecot*, 4 Car. & P. 315; *Gibson v. King*, Car. & Marshm. 458; *Harwood v. Bartlett*, 8 Scott, 171.

C. G. Loring and S. Bartlett, for the defendants.

SHAW, C. J. The first objection taken by the plaintiff is, that it does not appear, by the insolvent proceedings, that there was any adjudication, made by the master, of the truth of the facts stated in the petition of the insolvents, previously to the issuing of the warrant; that the proceedings were consequently void, and the defendants fail to establish their title as assignees.

It will be understood that these were not proceedings *in invitum*, commenced by creditors, but a voluntary proceeding of the debtors on their own petition. The act provides, *St. 1838, c. 163, § 1*, that any debtor residing in this commonwealth, who shall desire to take the benefit of the insolvent act, may apply by petition to the judge of probate, setting forth his inability to pay all his debts, and his willingness to assign all his estate and effects for the benefit of his creditors, and praying proceedings; and if it shall appear to the satisfaction of the judge, that the debts due from the applicant amount to not less than \$500, (since reduced to \$200) the said judge shall forthwith, by warrant under his hand and seal, appoint a messenger, to take possession of all the property of the debtor. The desire of the debtor, his inability, and his willingness to assign, are all proved by the petition. But the judge is to be satisfied, that he owes \$200. How? The statute gives no direction. But it is manifestly to be a

summary proceeding, because he is forthwith to issue his warrant. It is clearly not a hearing on notice, as between adverse parties. It must be on evidence satisfactory to the judge. The warrant is to issue before the appointment of a clerk; of course there can be no record, in the proper sense of the term, entered by a clerk, until after the issuing of a warrant. If entered at all, it must be done afterwards, from minutes furnished or direction given by the judge. *Randall v. Barton*, 6 Met. 518. But the warrant could not issue, unless he was satisfied of the existence of the debt required. *Commonwealth v. Bolkom*, 3 Pick. 281. The issuing of the warrant, therefore, with its statements and recitals, by necessary implication, amounts to an adjudication of his satisfaction; and the statute has prescribed no form. There being no law, no binding precedent, and no settled practice in regard to the form, we think this sufficient. It is admitted that there is no case in point, but it is argued, that it is within a principle adopted in analogous cases. The cases cited are mostly those of summary convictions in criminal proceedings before justices, where, as the accused is deprived of a trial by jury, the utmost nicety is required; or cases on the bastardy or highway acts, governed by the terms of particular statutes. The case of *The King v. Harris*, 7 T. R. 238, was a summary conviction before justices, on a statute, for shooting at hares. Without referring to the cases in detail, which have all been examined, they will be found to be generally upon statutes regulating adversary proceedings, where an adjudication, as that of filiation, or common convenience and necessity, is made the basis of other proceedings. So far as the rights of the insolvents and all others in privity with them are concerned, the petition itself is conclusive; for *volentibus non fit injuria*. As to others, the statement and recital in the warrant are *prima facie* sufficient; and if an attaching creditor, or other person affected, is in danger of suffering, he has a remedy in a summary application to this court. How this would stand in case of an adversary proceeding by creditors, against an insolvent debtor, we give no opinion.

The next question arises from an objection to the docu-

ments and proceedings in insolvency, including the schedules filed by the insolvents, which were offered by the defendants, objected to, but admitted.

Under the restrictions with which the admission of these papers was accompanied, it appears to us that they were not objectionable, though not of much importance. They were offered and admitted, not on account of the schedules, but as a whole, as evidence of the regular commencement, prosecution and course of the insolvent proceedings, on which the authority of the defendants, as assignees, was founded, and for no other purpose. For this purpose we think they were competent, though perhaps not necessary.

The next point insisted on by the plaintiff was, that the books of Norcross and Wood were improperly admitted as evidence of the general state and condition, as to solvency or insolvency, of Norcross and Wood; no sufficient evidence having been given of the truth of the entries therein by the testimony of those who made them. As this is a point strongly and perhaps principally relied on, it seems necessary to state it somewhat particularly. [Here the chief justice stated the testimony of Wood, and the ruling of the judge thereon, as *ante*, 140, 141.]

In order to decide the question, whether these books were competent evidence, it seems proper to consider the nature of the issue to be proved. This mortgage was made not long before the commencement of proceedings in insolvency under the statute upon the voluntary application of the debtors. In order to invalidate this mortgage, and maintain the defence, under *St.* 1841, *c.* 124, § 3, which was then in force, it was necessary to show that the mortgagors, Norcross and Wood, either being in fact insolvent, or in contemplation of proceedings in insolvency under the statute, made the mortgage to Holbrook, intending to give him a preference, as a preëxisting creditor. This would render the mortgage void, unless the debtors had reasonable cause to believe themselves solvent, and provided that Holbrook, in accepting such preference, had reasonable cause to believe that Norcross and Wood were insolvent.

These were the facts to be proved; and the court are of opinion, that for this purpose, and to the extent to which these books were admitted, they were competent evidence. It appears to us, that the admission and the authentication of books, under these circumstances, depend on rules distinct from those which regulate the admission of a party's own book of original entries, verified by his oath, to prove items of book debt. They are admitted on a different principle, and are to be proved in a different manner. *Union Bank v. Knapp*, 3 Pick. 96. The insolvent law requires that all the books of account of the debtors shall be delivered to the messenger, and the debtors are compellable to disclose and surrender them, and they are placed in the hands of the assignee. This of itself would not make them legal evidence as against third persons; but it certainly manifests the intention of the law, that the assignee shall be furnished with all the knowledge of the affairs of the insolvents, which their books of account will afford him, and shall be enabled to use them as evidence, upon occasions and between parties, when, upon proper grounds, they are admissible. The court are of opinion that this was such an occasion.

It appears by the evidence, which was in when this decision of the court was made, admitting the books as competent, that they comprised the entire set of account books kept by the firm, in the usual course of their business, by one of the partners, and a bookkeeper retained for the purpose; that they were believed to be correct, and were recognized and acted upon habitually by the partners, as exhibiting an authentic and true statement of all their mercantile concerns. The decision, admitting these books generally, was made after objections taken by the plaintiff to the proof of several particular entries successively, on the ground either that they were not original entries, or that they could only be proved by the clerk who made them. Among the facts to be proved, were the actual insolvency of the mortgagors, or the reverse; whether they had or had not reasonable grounds to believe themselves solvent; and whether the mortgagee had or had not reasonable grounds to believe them insolvent. The

knowledge, intent and purpose, and the reasonable grounds of belief of one party, may be proved by evidence drawn from one source, and those of the other party from another. Such is the old and established rule, in the trial of the question of a fraudulent conveyance, void as against creditors. *Bridge v. Eggleston*, 14 Mass. 245; *Foster v. Hall*, 12 Pick. 89. To prove the state of the firm as to solvency, their knowledge and belief respecting it, and the reasonable grounds which they had or had not to believe themselves solvent, the books of the firm were competent evidence; and the proof that they were kept as books of account are usually kept by mercantile houses, and were recognized and acted upon by them as exhibiting a true and correct state of their affairs, was sufficient proof of authentication for that purpose.

The next objection was to the testimony of Rogers. [The chief justice here quoted what is stated in the report, about the testimony of Rogers, *ante*, p. 141.] Had the books been rejected on this trial, we should have thought that the parties would not be bound by an assent formerly made upon the assumption that the books themselves were competent. The object was not to introduce a new substantive species of evidence, but to facilitate access to the contents and results of the books, as evidence. But as these books were admitted again on the present trial, though objected to, and were admitted, as we now think, rightly, we are of opinion that the testimony of the auditor, and his report, made under the former rule, entered into by consent of parties, were properly admitted. It was made in the same cause, for the same purpose, namely, to aid the jury in getting at results from the books. It is, we think, within the spirit of Rev. Sts. c. 96, § 25, authorizing the court, whenever it shall appear that the trial of a cause will require an investigation of accounts, to appoint an auditor.

Some exception was taken to the instruction given by the court to the jury. The judge directed them that, to maintain the defence, the defendants must prove that Norcross and Wood, being insolvent and knowing their situation, and in expectation or anticipation of stopping payment, made the

mortgage to the plaintiff, with the intention to give him a preference for preëxisting debts, over their general creditors, and that the plaintiff had reasonable cause to believe them insolvent; that if the defendants established these facts, then their mortgage was void, as against the other creditors. This charge was sufficiently favorable to the plaintiff, and in some respects too much so, as we do not think it necessary, in order to avoid the conveyance, that the debtors knew that they were insolvent, or in fact contemplated proceedings in insolvency; it is enough that they were in fact insolvent, and had no reasonable ground to believe themselves solvent. The position contended for by the counsel for the plaintiff was, that, at the time the mortgage was made, Norcross and Wood believed themselves solvent, able to pay all their debts, and expected and intended to go on with their business, anticipated no failure or stoppage, and had no intention to give preference to Holbrook, but gave the mortgage in the regular course of business, and as a means of enabling them to carry it on; and so the mortgage was good. The court directed the jury that if the mortgage was made with no intention to give a preference, but in the regular course of business, expecting and intending to go on, and as a means of going on, the security given under such circumstances, with such intent, would be valid. The court are of opinion, that the residue of the plaintiff's position, for reasons already given, was not tenable, and that an instruction conformable to it would not have been correct. The counsel for the defendants had maintained that an obviously absurd or wilfully blind state of mind, wholly inconsistent with actual contemporaneous knowledge brought home to the debtor, would not suffice to disprove an intent to prefer; but the plaintiff's counsel insisted, that any sincere actual belief of the nature referred to, however mistaken, would disprove such intent; and the court, in reference to these positions, left it with the jury, saying that they must decide, whether, looking at the facts as they actually were at the time, judging as reasonable men, and regarding Norcross and Wood as rational beings, the jury could believe, that, at the time they made the mortgage, they could expect to go on with their busi-

 Holbrook v. Jackson & another.

ness, notwithstanding the declaration of Norcross, of his private views and intentions. These latter remarks appear to be a comment on the evidence, a portion of which, the testimony of Norcross, is not given. As such comment, they are not objectionable; but we think the position insisted on by the plaintiff, that 'although actually insolvent, and although they had no reasonable ground to believe themselves solvent, against the fact, yet a sincere belief that they could go on, however groundless, and an intention to do so, would save the conveyance from being held invalid, cannot be maintained as law, under the existing statute. The provision of the bankrupt law of the United States, under which the case of *Jones v. Howland*, 8 Met. 377, was decided, was very different from the present; it turned upon the question of actual belief and intent, and not on reasonable ground to believe.

On the whole, the court are of opinion that the objections taken by the plaintiff to the proceedings at the trial are untenable, and that judgment be rendered on the verdict.

After this opinion was given, the counsel for the plaintiff requested that the entry of judgment might be delayed a short time, so that they might be heard further on a point not noticed by the court in the foregoing opinion; and this request was granted by the court.

R. Choate and *B. R. Curtis*, for the plaintiff, now contended that a new trial ought to be granted, because the defendants were allowed to read to the jury, as evidence of the facts stated therein, entries from the books of Norcross and Wood, made *after* the execution of the mortgage in question, showing payments and receipts of money by Norcross and Wood *after* the execution of the said mortgage; Norcross himself, who made the entries, being living and within the reach of process, and a competent witness. *Bridge v. Eggleston*, 14 Mass. 245; *Foster v. Hall*, 12 Pick. 89; *Phoenix v. Dey*, 5 Johns. 426; *Clarke v. Waite*, 12 Mass. 439; *Doe v. Webber*, 1 Ad. & El. 733; *Augusta v. Windsor*, 1 Appleton, 321; *Nicholls v. Webb*, 8 Wheat. 326; *Watts v. Howard*, 7 Met. 481.

C. G. Loring and *S. Bartlett*, for the defendants.

SHAW, C. J. The facts to be proved, to invalidate the mortgage and sustain the defence, were these ; that the mortgagors, Norcross and Wood, being insolvent or in contemplation of insolvency, made the mortgage to Holbrook, the plaintiff, intending to give him a preference as a preëxisting creditor ; and thus avoiding the mortgage, under *St.* 1841, c. 124, § 3, unless the said debtors had reasonable cause to believe themselves solvent, and *provided* said Holbrook, in accepting such preference, had reasonable cause to believe that they were insolvent. The facts to be proved on the part of the defendants, to avoid the mortgage were, 1. That said debtors were in fact insolvent ; 2. That they had no reasonable cause to believe themselves solvent ; and 3. That Holbrook had reasonable cause to believe them insolvent. It must be actual insolvency without reasonable *cause to believe* themselves solvent ; not actual belief of their insolvency, on the part of the mortgagors. It must be reasonable cause, on the part of the mortgagee, to believe ; not actual knowledge or actual belief, that they were insolvent. The issue on the part of the defendant was to prove these facts ; on the part of the plaintiff to resist and repel the proof of them.

A great part of the proof of these facts must bear upon the point of knowledge, intention and reasonable ground of belief, to be inferred by the jury from a broad and comprehensive view of the course of business of the debtors, and especially from the course of dealings between these parties. Their mercantile transactions for a course of years were involved in the inquiry. A great amount of evidence upon these points was introduced, some of which, it appears by the report, is not stated.

The defendants, to maintain the issue on their part, proposed to introduce the books of Norcross and Wood, and, to verify them, offered the testimony of Wood. He testified that the books produced were the regular books of their firm, kept by his partner and a bookkeeper, that they contained the daily entries of their business, that he believed them to be regularly kept, and that he acted on these books, as the books of the firm. The plaintiff objected to the books, but the court

Holbrook v. Jackson & another.

ruled that they were competent and admissible; 1. To prove the general state and condition of the firm, as to solvency or insolvency, and 2. As tending to show the knowledge of Norcross and Wood of their own condition. Other evidence was offered, other objections taken and points reserved, and instructions were given under which the case went to the jury, which we have already had occasion to consider, and have thought them sufficiently favorable for the plaintiff.

But the sole question now arises from the admission of the books. In the opinion heretofore given in this case, the court held that the books were competent evidence for the purpose for which they were offered, without bringing home the knowledge of them to the other party, and cited some authorities to that effect. The court were then informed that they had overlooked an important and material consideration, to wit, that although the books would be competent evidence of the knowledge and purpose of the mortgagors at and before the time of the conveyance, they could not affect the validity of the title, which they had already given, by any entries in their books, or other acts or declarations done without the knowledge of the mortgagee. As there was no time then to examine the subject, the clerk was directed to postpone the entry of judgment. If we had done injustice to any party, by overlooking a material fact, or mistaking any principle of law, we should be most anxious to avoid it; but in our anxiety to avoid injustice to one party, we must take care not to do injustice to another.

It is now stated by the counsel for the plaintiff, that the most important part of the evidence derived from these books was drawn from entries made after the conveyance in question; and although the acts and the declarations of the mortgagors, at the time of the conveyance, may be good evidence of their intent and purpose, yet that acts and declarations, done and made afterwards, could not be admitted to invalidate their previous conveyance. Before considering the question, it becomes necessary to inquire whether any exception, founded on the distinction between entries made *before* and those made *after* the conveyance, was taken at the jury trial,

or in the argument on the report. The question is, whether the defendants were permitted by the authority and direction of the judge, and against the objection of the plaintiffs, to read these after entries.

We have looked at the report again, with great care, and we see no other objection than that which was made generally to the books, as books of account. This objection was overruled, and we thought, when the case came before the whole court, properly; they were received for the purpose of proving a knowledge of the mortgagors, of their own affairs. We thought it was right; for though Wood said he did not keep the books, yet the books were their regular books, kept under their direction; they annually took a trial balance, and kept an account of profit and loss. Every merchant must be presumed to know, and in fact, from his balance sheet and books generally, does know, the state of his concerns. This was the objection, and this was the decision upon it.

But it was suggested when this motion was made, and has been stated to us now, that the objections of the defendant's counsel went further, and the ruling of the court upon them went further, than is stated in the report. We have listened to these statements with an earnest desire to ascertain whether, by any amendment of the report or in any other mode, the plaintiff could have the benefit of an exception actually taken and overruled, but which through inadvertence does not appear in the report. From these statements we are led to believe that, after the ruling of the judge that the books were admissible, and when a witness was called to a particular entry, it was objected that it could only be proved as an original entry and by the clerk who made it, as if the case were within the rules applicable to shop books, used as proof of a debt. But the grounds on which the books were held admissible overlooked these distinctions, and placed the case on a distinct ground, which was, that for the purpose for which they were admitted, they were equally competent, whether the particular entries were made by one person or another, whether original entries or ledgers, journals, balance sheets, or other secondary books, drawn from the original entries. This objection having

been made to particular entries more than once, and overruled, the judge stated that the books generally were competent and admissible, and no further objection was made.

Now, as we understand it, this did not alter or change the rule previously given, as to the object and purpose for which the books were admissible, but only went to the extent that all the entries in all the books were equally admissible, without regard to their being original, and without regard to the person who made them. If it had been intended to make objection to particular entries, on another and distinct ground, to wit, that they tended to prove the acts and declarations of the grantors, at a time when they could not by their acts or their intentions impair the title which they had given, this should have been made the subject of a distinct objection. Had the attention of the judge been called distinctly to the point upon which such an objection could be well taken, the evidence of entries subsequent to the mortgage might have been rejected, and the proof from the books confined to those entries, which were unobjectionable on that ground; and if the evidence ought to have been so limited, it must be presumed that the evidence would have been allowed to go no further. Or had this specific objection been taken, the counsel for the adverse party might have waived the introduction of the objectionable entries, or supplied them by other evidence. Every one feels how important it is, upon every account, that all such exceptions should be specific and made at the trial, where they may be acted upon or avoided.

Some very significant remarks of Lord Holt, upon this subject, are found in the case of *Wright v. Sharp*, 1 Salk. 288. It was a motion to have exceptions allowed after the trial. Lord Holt said: "You should have insisted on your exception at the trial; you waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause upon this point." A similar case came before this court recently. *Howard v. Hayward*, 10 Met. 408. Exceptions were taken to the records of a proprietary, on the ground that owners of

White v. The Winnisimmet Company.

a lot of land and the meeting-house thereon were not such tenants in common as were authorized by the statute to incorporate themselves as a proprietary; but the objection was overruled, and the books admitted, with liberty to refer to them in the argument. It was insisted on the argument, that the proprietors did not organize themselves agreeably to the statute, and that this would appear by the records, thus made part of the case. But, said Mr. Justice Wilde, delivering the opinion of the court, "we think these objections are not now open on this bill of exceptions. The objections should have been specifically made at the trial, when the defects in the record might have been supplied by other evidence."

We cannot perceive, even by the statements of counsel, independently of the report, that this objection to entries, made in the debtors' books after the conveyance, was specifically made at the trial, and we are confirmed in the belief that it was not, by the fact, that, as far as the recollection of any of us goes, the cause was not argued on that ground, when the case first came before the full court, nor was it suggested until after the opinion was given. Nor does it appear that any material proof was derived from such entries, which could not have been supplied by other evidence.

On the whole, the court are of opinion, that none of the objections to the verdict can be sustained, and that there must be judgment thereon for the defendants.

SHERMAN WHITE vs. THE WINNISIMMET COMPANY.

A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for their transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his

White v. The Winnisimmet Company.

property, by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, springs against the chain stretched across the end of the boat and attached to a hook, insufficient in strength for the purpose for which it is designed, breaks the hook, and throws himself and the wagon overboard, whereby the horse is drowned, and the merchandise in the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred, the proprietors of the ferry are not responsible for the loss of the horse and the damage to the merchandise so occasioned.

THIS was an action on the case against the proprietors of a ferry for an injury to the plaintiff's property, occasioned by his horse and loaded wagon falling overboard from one of the defendants' boats, while passing from Boston to Chelsea. The case was submitted without argument by the plaintiff, and was argued by *W. H. Gardiner*, for the defendants. The facts are sufficiently stated in the opinion.

DEWEY, J. To a certain extent, persons keeping and maintaining a ferry are common carriers, and subject to the liabilities attaching to common carriers. It would be so, if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company, to be carried from one place to another for hire. Upon receiving such goods for transportation, the ferry company stipulate to carry them safely, and subject themselves to strict liability for the safe carriage and delivery of such goods; being only exempted for losses occasioned by those acts, which are denominated "acts of God, or of a public enemy." The principle above stated would embrace the case of a horse and wagon received by a ferryman to be transported by him on a ferry-boat, the ferryman accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferryman.

But if the traveller uses the ferry-boat as he would a toll bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat; neither putting his horse into the care and custody of the ferryman, nor signifying to him or his servants any wish or purpose to do so; and the only possession and custody, by the ferryman, of the horse and vehicle to which he is attached, is that

which necessarily results from the traveller's driving his horse and wagon, or other vehicle, on board the boat, and paying the ordinary toll for a passage; in such case, the ferry company would not be chargeable with the full liabilities of common carriers of merchandise. The liability in this case would be one of a different character; and if the proprietors of the ferry were chargeable for loss or damage to the property, it would be upon different principles. In reference to persons thus using the ferry, the company have responsible duties to perform; the neglect of which may charge them for the loss of goods and property placed on board their boat, when the loss has been occasioned by their default. It is the duty of a ferry company to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable and requisite accommodations for the entry upon, the safe transportation while on board, and the departure from the boat, of all horses and vehicles passing over such ferry. They are required to be provided with all proper and necessary servants and agents requisite for the safe and proper conducting of the business of the ferry, and with all proper and suitable guards and barriers on the boat, for the security of the property thus carried on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller. For neglect of duty in these respects, they may be charged, but the liability is different from that of common carriers. The case of such a traveller, though not entirely similar, much more resembles that of a traveller upon a toll bridge or turnpike road; who, while he uses the easement of another, yet retains the possession and custody of his horse and wagon. The party, thus driving his own horse upon the boat, and retaining the custody of him, is bound, like the traveller on the toll bridge or the turnpike road, to use ordinary care and oversight in respect to his horse while on the boat, and if he does not use such ordinary care and oversight in respect to him, and for want thereof, the horse leaps overboard, or receives on the boat some injury, all which might and would have been avoided, if the party had used proper care and dili-

gence, such party must himself bear the loss which has thus been occasioned by his own neglect.

In deciding upon the nature and extent of the liability of ferrymen, and how far they are to be charged as common carriers, regard is to be had to the nature of the employment, and especially to the thing to be transported. This principle is practically applied in the well known distinction relating to the liability of the proprietors of stage coaches and other vehicles, as to the carriage of persons. No person thus carried in a public vehicle can recover damages for an injury to his person, if his own want of ordinary care contributed to the injury. Such carriers are not common carriers, with all the liabilities as such. One reason for the distinction is, that persons thus carried are not and cannot be placed under the same custody and control as bales of goods. Being intelligent beings, and having the power of locomotion, and having the opportunity on the one hand, by their own voluntary acts, of exposing themselves to greater hazard, and on the other of guarding to some extent against perils, the law properly requires a person thus carried to exercise ordinary care and vigilance to avoid exposure to danger; and if this is not exercised, and an injury is sustained, the carrier is not liable therefor.

The same principle is also further illustrated in the various decisions of the courts, in cases of actions instituted for the purpose of charging the carriers of slaves as common carriers of merchandise. It was successfully, and certainly most properly contended, as to the carriage of slaves, that in those states where slavery is allowed by law, and where slaves are to some purposes treated as chattels, yet as they are human beings, and cannot and ought not to be stowed away and confined like bales of goods, and placed under the absolute control of the carrier, the principle of the common law applicable to common carriers of merchandise could not be applied to the carriers of slaves. This was so held in *Boyce v. Anderson*, 2 Pet. 150; *Clark v. McDonald*, 4 McCord, 223.

As having some bearing also on this question, we may allude to the modification of the principle of general liability as common carriers, in those cases where the owner of goods

White v. The Winnisimmet Company.

accompanies them in their transit, retaining a certain control over them, as in *Brind v. Dale*, 8 Car. & P. 207, where it was held, that if the owner of goods accompanies them to take care of them, and is himself guilty of negligence, he is not entitled to recover. This case also affirms, as a rule of law, a principle often found elsewhere, and which bears directly, as we think, upon the case before us, "that a party cannot recover, if his own negligence was as much the cause of the loss as that of the defendant."

Thus we perceive that a modification of the liability attached to common carriers occurs, as the nature of the thing to be carried, and the extent of the custody and control over it, by the carrier, varies. We think that the propriety of such a modification of what is certainly a very stringent rule of liability, in reference to cases where the entire custody and control of the property is not with the carrier, is quite obvious.

The case of a traveller conveyed by means of a ferry-boat, where the traveller enters upon the boat driving his horse attached to a wagon, or other vehicle, selecting his own place upon the boat, and continuing to retain under his own custody his horse and wagon, neither committing it to the care of the ferryman or his servants, or signifying any wish or purpose so to do, presents another instance where the liability of the carrier must be considered as of a restricted character; and, as in the case of a carrier of persons, duties devolve upon the traveller, and he is bound to use ordinary care and diligence in respect to his horse and vehicle, in order to prevent, as far as he can, by such care, any injury occurring from fright, or from other cause immediately resulting from the movements of the horse. When such horse or other animal is not surrendered into the custody of the ferryman, the driver is bound to do all that can be effected by reasonable diligence and supervision, to prevent a loss of his property occasioned by his horse becoming restless or affrighted. If the traveller wholly neglects his duty in this respect, leaving his horse without any oversight, and the horse, without the fault of the ferryman, becomes affrighted and throws himself and the ve-

hicle to which he is attached overboard, when, by proper care and attention of the driver, this casualty would in all reasonable probability have been avoided, the loss must fall upon the traveller.

This case is to be decided by the application of these principles to the agreed facts stated by the parties.

These, briefly stated, are as follows: The defendants keep and maintain a ferry between Boston and Chelsea, and the plaintiff, travelling with his horse and wagon loaded with merchandise, drove the horse and wagon upon the ferry-boat of the defendants, paying the usual toll for his horse and wagon. The plaintiff did not occupy the place assigned him by the agent, but selected his own position; no further objection being made after he had taken it. He did not commit the charge of the horse and wagon to the particular custody of the servant of the defendants, or express any wish or purpose to do so. The horse had not been accustomed to pass over upon this ferry-boat. The plaintiff remained on board the boat, but left his horse and was at some distance from him with no one to have an oversight over him, or to restrain him, if frightened. In this state of things, the horse became frightened at the ringing of the bell, as the boat approached the shore, and sprang forward, struck the chain thrown across the forward end of the boat, with such force as to cause the hook connected with it to give way, and thereupon the horse and wagon went overboard. The horse was drowned, and the merchandise in the wagon greatly injured.

The facts, as stated, also show that the iron hook, by which the chain was fastened, was defective and insufficient in strength for the purposes it was designed to answer; though the defendants and their agent had no knowledge of that fact. This defect was one for which the defendants were answerable, and which, under other circumstances, might have charged them with the loss. But, unfortunately for the plaintiff, the facts also show a want of ordinary care and diligence on his part, in the oversight and care of his horse, and that, by want of such care and oversight, this loss was in all probability occasioned.

 Ellis & others v. Page & others.

Every person is bound to use reasonable care to prevent damage to his property, and if the injury is attributable to himself in part, he cannot recover, although there may have been negligence on the part of the other party also. This doctrine is fully sustained by the case of *Smith v. Smith*; 2 Pick. 621, and by 2 Greenl. on Ev. § § 220, 473, and cases there cited. The court are of opinion that, upon this ground, there must be

Judgment for the defendants.

GEORGE ELLIS & others vs. EDWARD PAGE & others.

A devise to an heir at law of exactly the same estate in land as he would take by descent without the devise is void, and the heir takes the land by descent.

A testator devised land to certain trustees, "in trust to pay over the net rents and income thereof to his son, C., during his life, and, on his decease, to convey in fee, and pay to his children, said houses and lots, or the proceeds thereof, in case they have been sold, and in default of such children, to convey and pay the same to his heirs at law;" and authorized the trustees to sell, at their discretion, any of the land so devised to them; but no sale was ever made by them under this power, and C. died without issue. The personal estate of the testator was insufficient to pay debts and legacies. It was held, that the devise to the heirs at law of C. was not a specific devise, but that the land so devised was liable to be sold for the payment of debts and legacies, under the Rev. Sts. c. 71, § 20.

This was a bill in equity, brought by the executors of the last will of Ephraim Marsh. *J. Benjamin* and *W. Minot, Jr.*, submitted an argument in writing for those defendants who were legatees under the will. The other parties submitted the case without argument. The opinion of the court exhibits the whole case.

BIGELOW, J. This is a bill in equity in the nature of a bill of interpleader, brought by the executors of the last will and testament of Ephraim Marsh, against sundry persons, legatees and heirs at law of said Marsh.

The facts, as they appear by the bill, answers and documents in the case, are substantially as follows: Ephraim Marsh, the testator, died in the year 1837, leaving a will and

codicil, which were duly proved and allowed, March 22, 1847. In and by said will, he devised a part of his real estate, in different proportions, to his children and other relations in fee, and a part to his executors, in trust for his children and other persons. Among that part of his real estate devised in trust, were four dwelling-houses in Fayette, and two lots of land in Knox Street, in Boston, which were given to said trustees "their heirs and assigns forever, in trust to pay over the net rents and income thereof to" his "son Charles Marsh during his life, and, on his decease, to convey in fee, and pay to his children said houses and lots, or the proceeds thereof, in case they have been sold; and in default of such children, to convey and pay the same to his heirs at law." The trustees had full power, by the will, to sell at their discretion any of the real estate devised to them in trust for said Charles Marsh, but no sale had been made by them of any part of it at the time of the death of Charles Marsh, the *cestui que trust*, which took place in August, 1849, he leaving no issue. The testator also gave to sundry persons pecuniary legacies, amounting in all to fifteen thousand four hundred dollars, none of which have been paid by the executors. The personal estate of the testator falls short of paying debts and legacies, in the sum of about twenty two hundred dollars. The bill further states that, in order to settle the estate, it is requisite, either that said legacies should be proportionably abated, or that the real estate devised to said trustees, in trust for said Charles Marsh for life, and on his decease without children to be conveyed in fee to the heirs at law, should be sold, and the proceeds applied, so far as may be necessary, to the payment of said legacies in full.

The bill prays that said legatees and heirs at law may interplead and settle their rights to said estate, under the direction of the court, and that the executors may be advised how to proceed in the settlement thereof.

The question, whether the real estate devised to said trustees, by the clause of the will above cited, can be sold to make up the deficiency of personal estate and to pay the legacies in full, depends on the construction to be given to

that part of the will. If it is to be considered as a specific devise to the heirs at law, after the death of Charles Marsh, so that they take by the will, then it is very clear, that it cannot be sold to pay legacies, for the reason that lands, specifically devised, are not subject to be sold for the payment of specific legacies. *Scott v. Scott*, 1 Eden, 458, 461; *Hubbell v. Hubbell*, 9 Pick. 561. See also *Hays v. Jackson*, 6 Mass. 151. But if the heirs at law do not take under the will by purchase, but take by descent as heirs, then so much of the real estate as is included in this devise would come within the provision of Rev. Sts. c. 71, § 20, and may be sold as undevised real estate, for the payment of said legacies.

It is a well settled rule of real property, that a limitation to an heir in a devise is void, and that the heir cannot be a purchaser; Co. Lit. 22 b; or, to state the rule more fully, if a man devises by his will his land to his heir at law and his heirs, in such case the devise, as such, is void, and the heir will take by descent and not by purchase, for the reason that the title by descent is the worthier and better title, by taking away the entry of those who might have a right to the land. Powell on Devises, 427, 430; 6 Cruise, Greenl. ed. 151; 1 Jarman on Wills, 67. And it makes no difference as to the operation of this rule, that the land comes to the heir charged with payment of annuities or legacies, nor that the testator devises the land to one for life, remainder to his heir at law in fee, in which latter case the heir is in, on the termination of the life estate, by descent and not by purchase. So, too, it has been held, that the limitation to the heir, by devise in fee, after an estate tail, or the ingrafting of an executory devise, or the carving out of a contingent interest, or the limiting of the reversion in fee, or the alternate fee, to the heir at law, will not break the descent, and that when the estate devolves to the heir, he takes by descent and not by purchase. Powell on Devises, 427, 430; 1 Jarman on Wills, 67; Fearne's Post. Works, 128, 229; 1 Eden, 462 note; *Doe v. Timins*, 1 B. & Ald. 530; *Manbridge v. Plummer*, 2 Myl. & K. 93.

This rule of law, established in England by a long series of judicial decisions, was altered by statute of 3 & 4 William

4, c. 106. But it has been fully recognized as the common law of this state, and has not been changed by statute. *Parsons v. Winslow*, 6 Mass. 178; *Whitney v. Whitney*, 14 Mass. 90.

There would have been no difficulty in the application of this rule to the devise in question, if the estate had been given to the trustees for the life of Charles Marsh, and, on his decease without issue, then in fee to the heirs at law. It would then have come within the letter of the rule. But the devise in this case was to the trustees and their heirs, who, on the death of the *cestui que trust* without children, are to convey the estate in fee to the heirs at law. Does this so change the estate which the heirs take, or so break the descent, that the rule is inapplicable to this devise? In considering this question, it is to be remembered, that one of the great tests, by which to try the application of the rule, is to ascertain whether the tenure or quality of the estate which the heirs take is changed by the devise, *i. e.*, whether they take an estate different in quantity or quality from that which they would have taken if the estate had not been devised, but had been left to descend to them. Fearn's Post. Works, 229. Apply this test to the estate which the heirs at law take in this case on the death of Charles Marsh without issue. They take a fee simple, precisely what they would have taken, if no will had been made. Perhaps a clearer test is given by Chancellor Kent, who says: "Strike out the particular devise to the heir, and if, without that, he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase." 4 Kent Com. (6th ed.) 507. Now it is very clear, that, on the conveyance by the trustees of the estate in question to the heirs at law in fee, as provided by the will, the heirs will take exactly what they would have taken if no will had been made.

On looking into the will, it is manifest that the testator intended, in case Charles Marsh died without issue, his heirs at law should at once take the estate in question equally in fee. But as it might become necessary, during the life of the *cestui que trust*, to sell some portion or all of the real estates devised in trust, the testator gave to the trustees a power to

sell at their discretion, directing them, on the death of the *cestui que trust*, "if the estates shall have been sold," to pay the proceeds to the heirs at law, otherwise to convey to them in fee. The main purpose in devising the estates to the trustees and their heirs was, to enable them to execute this power of sale, if necessary, and convey a good title to the premises. As this power of sale was not exercised by the trustees during the life of Charles Marsh, as it was to have been, if exercised at all, it would not perhaps be a very forced construction to say that, after his death, the devise came within those cases where it has been held that a devise to trustees and their heirs may be construed so as to vest only a life estate in the trustees. *Doe v. Hicks*, 7 T. R. 433; *Curtis v. Price*, 12 Ves. 89.

But without deciding this point, and assuming that, on the death of Charles Marsh without issue, the legal estate was still in said trustees, yet they held it only to convey it in fee to the heirs at law. The main purpose of the devise in trust had been accomplished. The heirs have the entire absolute interest in the estate, and can compel the trustees to convey the legal estate to them. 1 Cruise, Greenl. ed. 418. The result is, therefore, the same as it would have been if the estate of the trustees had only been an estate *pour autre vie*, remainder to the heirs at law in fee. The equitable estate being thus vested in the heirs at law with a right to an immediate conveyance of the legal estate in fee, we see no good reason why it should not be subject to all the legal incidents to which it would have been liable, if both the legal and equitable estates had been directly vested in the heirs at law by the terms of the devise. It has been often held to be of the utmost importance to preserve a strict analogy between legal and equitable estates, in all respects, for the reason that it would destroy the whole harmony of the laws of real property, if the legal estate was subject to one set of rules and the equitable estate to another. *Wykham v. Wykham*, 18 Ves. 423, note. *A fortiori* is this important and necessary, when the entire equitable estate is in the same persons who have also the immediate right to the legal estate.

On these principles, we think the real estates included in

Reggio & another v. Braggiotti & another.

this devise cannot be considered as lands specifically devised by the will, but that they fall within the provisions of the Rev. Sts. c. 71, § 20, and are liable to be sold for the payment of legacies. This conclusion, we are satisfied, carries out the intent of the testator, while at the same time it conforms to the rules of law

Decree accordingly.

NICHOLAS REGGIO & another vs. DOMINICO BRAGGIOTTI
& another.

The measure of damages, in an action brought for a breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if any thing, of the article sold; and if the vendor has, in the mean time, sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty, is *prima facie* evidence of the amount which he can recover of his vendor; and, if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defence thereof.

In this action, which was trespass on the case for a breach of warranty on the sale of opium by the defendants to the plaintiffs, tried before *Fletcher, J.*, the declaration, besides the common counts, alleged that the defendants, on the 1st of April, 1845, in consideration that the plaintiff would and did agree to accept a consignment from them of eleven chests of opium, and to sell the same on the joint account of the plaintiffs and defendants, and would pay the defendants the sum of £490 sterling, for one undivided half thereof, and would account with and pay to the defendants one moiety of the net proceeds of the sales thereof, undertook and promised the plaintiffs, that the said eleven chests contained an article known in commerce as opium; that the plaintiffs, on the 1st of May following, relying on the defendants' said undertaking, accepted the consignment; that, on the 15th of August, 1845, the plaintiffs sold and delivered the eleven chests con-

Reggio & another v. Braggiotti & another.

signed to them, to Henshaw, Ward & Company, for the price of \$7,499; and, as a part of the contract of sale, undertook and promised the purchasers, that the said eleven cases contained an article known in commerce as 'opium; that the article contained therein, at each and all the times aforesaid, was not an article known in commerce as opium, but, on the contrary, was fraudulently prepared so as to resemble opium, and was of no value; that the plaintiffs afterwards paid the defendants the said sum of £490, and also accounted with and paid over to them one half of the net proceeds of the sale aforesaid, amounting to a large sum of money, namely, the sum of \$5,000; that Henshaw, Ward & Company instituted a suit against the plaintiffs, for a breach of the warranty on the sale to them, and recovered judgment therein for the sum of \$8,421.33, for damages and costs, which sum the plaintiffs, on the 2d of March, 1848, were obliged to, and did necessarily pay; that when, and as soon as the said suit was instituted, the plaintiffs gave notice thereof to the defendants, and specially requested them to take part in the defence of the same; and that the plaintiffs did afterwards incur large expenses and pay large sums of money, amounting in the whole to the sum of \$1,000, in and about the costs, damages and expenses of the said suit.

The plaintiffs put in evidence the record of the judgment obtained against them by Henshaw, Ward & Company; and Henshaw, one of the plaintiffs in that suit, testified to the identity of the chests, and that there was no warranty other than that the article was sold as opium. He testified also, that the article purchased remained in the possession of the purchasers for several weeks after the trial, and was then delivered to the plaintiffs.

The plaintiffs contended, that the record of the recovery in that suit, of the pendency of which due notice was given to the defendants in this suit, who had opportunity, and were repeatedly requested to defend the same, was conclusive upon the defendants of every fact found by the jury and necessary to the judgment therein, including that of the alleged falsity of the article sold as opium. And the court ruled that it was

Reggio & another v. Braggiotti & another.

evidence, but not conclusive, of the falsity of the article. And no other proof, as to the falsity of the article, was adduced by either party.

The plaintiffs also claimed a right to recover the amount paid by them as counsel fees, in defending themselves in said suit, amounting to \$350, and other charges, to which the defendants' counsel objected; but the court ruled that they were recoverable in this action; and the amount was separately assessed by the jury, so that, if not allowed by the court, the same might be deducted from the verdict.

The jury returned a verdict for the plaintiffs, which was to be set aside and a new trial granted, or the case otherwise disposed of, as the law might require.

C. G. Loring, for the defendants. This being a case of a warranty of genuineness only, and not of indemnity, and there being no fraud, nothing is recoverable but the price paid, and interest. *Powell v. Smith*, 8 Johns. 249; *Greely v. Dow*, 2 Met. 176; *Copp v. McDugall*, 9 Mass. 1; *Henshaw v. Robins*, 9 Met. 83; *Penley v. Watts*, 7 Mees. & Welsb. 601. The verdict should have been only for the amount paid by the plaintiffs for their half part, together with that remitted by them to the defendants for their half part and half profits, and should not have included the half profits made by the plaintiffs on the sale to Henshaw, Ward & Company. *Armstrong v. Percy*, 5 Wend. 535, 539, and cases above cited. The cases in which costs have been allowed, are most, if not all of them, of express warranty, or of warranty of title where the vendor knew that he had none. At any rate, counsel fees should not have been allowed. *Leffingwell v. Elliott*, 10 Pick. 204; *Guild v. Guild*, 2 Met. 229; *Wynn v. Brooke*, 5 Rawle, 106, 109.

B. R. Curtis, for the plaintiffs, to the point that the counsel fees expended and costs incurred in the former suit were recoverable in this, cited *Coolidge v. Brigham*, 5 Met. 68; *Swett v. Patrick*, 3 Fairf. 9; *Williams v. Wetherbee*, 2 Aiken, 329; *Lewis v. Peake*, 7 Taunt. 153; *Pennell v. Woodburn*, 7 Car. & P. 117; *Wrightup v. Chamberlain*, 7 Scott, 598; Sedgw. on Damages, (1st ed.) 171, 289 to 301.

SHAW, C. J. The first question to be decided in this case

relates to the amount which the plaintiffs are entitled to recover upon the original warranty, implied in the sale of the article to them as opium. That they are entitled to one half of the value is admitted; but the sum paid by Henshaw, Ward & Company was a large advance on the cost. Shall they be allowed one half of that?

A warranty binds the party entering into it to repay the difference between the actual value of the article sold, and that of an article corresponding to the warranty, or the whole value, if it prove worthless. Now the difficulty in the question arises from the uncertain meaning of the term "value." If it were the rule, that the price paid to the warrantor is the measure of the value, and that any loss on a subsequent sale by the vendee is not recoverable, this difficulty would be removed. *Prima facie*, the price first paid for the article is good evidence of its value, in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country, the established rule, in relation to damages in such actions, is, that the plaintiff may recover what he can show that he has actually lost. If the article is wholly worthless, then he shall recover what would have been its value to himself at the time of the warranty, had it corresponded with the terms of the warranty; and a subsequent sale is evidence of its value to him. In this case, the sale to Henshaw, Ward & Company was competent evidence of the market value of the opium, and, if satisfactory and uncontrolled, was conclusive upon the jury in regard to the amount to be recovered; not because they paid that sum, and the plaintiffs repaid it upon their warranty, but because that measures the actual loss sustained by them. The effect of this evidence varies in relation to different kinds of property. A second sale of a horse, for example, (and many of the English cases, in which this question is discussed relate to such property,) is not a good test of its value. The second vendor estimates, in fixing a price, his expenses in keeping the animal, and putting him in a suitable condition for sale. The English cases draw a nice distinction between

Shaw v. Hayward.

loss from the failure of a warranty, and the loss of a good bargain, and hold that the latter is not admissible as an element of damages. *Clare v. Maynard*, 6 Ad. & El. 519, and 7 Car. & P. 741. But still, the prevalence of authority in England is, that a second sale is evidence, though not conclusive, of the value, and admissible simply as one mode of ascertaining it.

The plaintiffs, then, as no evidence was offered in relation to the value of the opium, to control that introduced by them, are entitled to recover one half the amount paid to Henshaw, Ward & Company. As they gave notice to the defendants of the pendency of the first action, they are also entitled to recover their taxable costs. See *Coolidge v. Brigham*, 5 Met. 68. But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel, that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs. The verdict must be amended in accordance with this opinion, and judgment entered upon it for the plaintiffs.

GEORGE A. SHAW vs. JOHN S. HAYWARD.

H., residing in Illinois, made a covenant with S., residing in Boston, to convey to him certain lands in Illinois, the conveyance to be made before a day named. At the time of this covenant, the parties verbally agreed that H. should record the deed in Illinois, before sending it to S., in Boston, but so as to have it in Boston before the day named in the covenant. It was held, that depositing a deed of the lands, duly executed, in the proper registry in Illinois, to be recorded, was a delivery to S., and, if made before the day named, a full performance of the covenant, although the deed was not sent to Boston until after that day.

THIS was an action of covenant broken, brought on an instrument bearing date of the 22d of August, 1844, whereby the defendant, residing in Hillsboro', in the county of Mont-

Shaw v. Hayward.

gomery, and state of Illinois, covenanted to convey to the plaintiff, who resided in Boston, certain lands in Montgomery county, "said conveyance to be made before the first day of January next."

The defendant pleaded the general issue.

At the trial in this court, before *Dewey, J.*, the plaintiff proved the execution of the instrument, by the attesting witness, who, in the course of his examination, stated that, at the time of its execution, both parties being present, something was said about Hayward's getting the deed of the land recorded; and that it was understood by both parties, that Hayward should complete and record the deed before he sent it on, but so as to have it in Boston by the 1st of January, 1845; that he was sure that time was mentioned; and that Shaw called Hayward's particular attention to the fact, that the deed must be at Boston, or sent to Boston, by the time named in the bond.

To prove the breach of the covenant, the plaintiff called Ezra Farnsworth, (in 1844, and ever since, a partner of the plaintiff,) who testified that, early in February, 1845, the firm received a letter from the defendant, in his handwriting, addressed to them, bearing date at Hillsboro', January 6, 1845, inclosing a warranty deed, in due form, of the lands described in the bond to convey. The deed bore date of December 3, 1844, and purported to have been acknowledged on the fifth of said December, and left for record at the proper office on the 12th of the same month. It did not appear when the deed was extended on the record; nor did it appear that the defendant gave the plaintiff any notice that it was left for record, before his letter of January 6th, 1845.

The defendant introduced evidence to show that the deed was left for record at the time it purported to have been so left; and also offered in evidence the statute law of Illinois, as to the effect of the record of a deed left for registry.

The defendant contended, and asked the judge to rule, among other things, that the conveyance was duly made at the time the deed was left for record in Illinois, December 12th, 1844, and so the condition of the obligation was per-

formed; that a delivery to the register was a delivery to the plaintiff, if made in pursuance of the direction of the plaintiff; that the arrangement, as testified to by the attesting witness, that the defendant was to get the deed recorded, and return it to the plaintiff before the first of January, 1845, was so far a waiver of the place of delivery, as to make the delivery effectual the moment the deed was left at the registry in Illinois, even though it was not received by the plaintiff in Boston before January 1st, 1845; that effect might be given to so much of that arrangement as to make the delivery perfect; and that, not being inconsistent with the covenant for the fulfilment of the other part of the agreement, he must have his remedy in some other way than under said covenant.

The judge instructed the jury that a delivery after the time stipulated in the covenant was a good and sufficient performance of the covenant, if the plaintiff agreed to the postponement of the time of the delivery, or knowing that the delivery was of a date subsequent to that stipulated for in the covenant, received the deed, not refusing or objecting to receive the same.

The judge also, in answer to the prayer of the defendant for the instruction that if the plaintiff requested the defendant to get the deed recorded it was a delivery to the plaintiff at the time it was so left for record, instructed the jury, that if the evidence showed that request in the form stated, and with no limitation or qualification to it, such request might properly be taken to have that effect, and if the defendant complied with that request, so made, and, after executing the deed, left it in the registry of deeds to be recorded by the register as a deed delivered to the plaintiff, this would constitute a good defence to the present action. The presiding judge then called the attention of the jury to that part of the evidence of the subscribing witness tending to establish the fact that the defendant was requested to procure the deed to be recorded in Illinois, and also to that part of it tending to show that the plaintiff did not waive the stipulation that the deed was to be forwarded to him at Boston by the first of January, 1845; and directed the jury to consider the whole of the testimony of the

Shaw v. Hayward.

witness, and instructed them, that if, upon this testimony, they found that the delivery of the deed was to be made in Boston at the time above stated, then it would not constitute a defence to this action, that the defendant executed the deed in Illinois, and left it there for record before the 1st of January, 1845, if he did not forward it to the plaintiff until after that date.

The other questions which arose at the trial are not material to be stated.

The jury returned a verdict for the plaintiff. If the instructions given were not sufficiently favorable to the defendant, a new trial was to be granted, otherwise judgment to be rendered on the verdict.

W. Brigham, (with whom was *S. Bartlett*,) for the defendant, cited Rev. Sts. of Illinois, c. 24, § 1, 22, 23; *Cook v. Hall*, 1 Gilm. 575; *Duncan v. Wickliffe*, 4 Scam. 452; *Doyle v. Teas*, 4 Scam. 202; *Bryan v. Walsh*, 2 Gilm. 565; *Church v. Gilman*, 15 Wend. 656; *Jackson v. Bodle*, 20 Johns. 187; *Belden v. Carter*, 4 Day, 66; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Hatch v. Hatch*, 9 Mass. 307; *Foster v. Mansfield*, 3 Met. 412; *Maynard v. Maynard*, 10 Mass. 456; *Ruggles v. Lawson*, 13 Johns. 235; *Shep. Touchst.* 57, 58; *Hedge v. Drew*, 12 Pick. 141.

H. M. Parker, for the plaintiff, cited *Shep. Touchst.* 57, 58; *Jackson v. Phipps*, 12 Johns. 418, 422; *Shirley v. Ayres*, 14 Ohio, 307, 309; *Maynard v. Maynard*, 10 Mass. 456; *Chess v. Chess*, 1 Pennsylv. 32; *Kemp v. Walker*, 16 Ohio, 118; *Commonwealth v. Selden*, 5 Munf. 160; *Ruggles v. Lawson*, 13 Johns. 285; *Harrison v. Phillips Academy*, 12 Mass. 456, 461; *Barns v. Hatch*, 3 N. H. 306; *Bryan v. Walsh*, 2 Gilm. 557, 565; *Ferguson v. Miles*, 3 Gilm. 358; *Hulick v. Scovil*, 4 Gilm. 159, 175, 176; *Jackson v. Richards*, 6 Cowen, 617, 619; *Merrills v. Smith*, 18 Conn. 257, 261, 262; *Jackson v. Dunlap*, 1 Johns. Cas. 114, 116.

SHAW, C. J. Upon these facts, if the inclosure from Illinois, so that the deed might arrive in Boston before 1st January, 1845, was the act to be performed, the covenant was not fulfilled; if it was the delivery to the register in that state, then

the defence is sustained. The defendant requested the court to instruct the jury that the conveyance was made when the deed was left with the register, and that that was a delivery to the plaintiff; but the presiding judge so qualified his instructions, that it was left for the jury to determine whether the acts done constituted a legal delivery. The covenant was to convey, and the execution and delivery of a sufficient deed would pass the title. What, then, is a delivery? It is that which gives effect to a deed, and transmits the title of the property to be conveyed. It need not be made to the grantee himself; for if an instrument be handed to a third person as a deed, at the request or with the assent of the grantee, it operates as a delivery. The request to the defendant to record the deed, in this case, was a direction as to the mode of delivery. The only purpose to be attained by this was notoriety and the publication of the transfer; and if the grantor deposited the deed in the registry, to be recorded, at the request, and by the direction of the grantee, this was a technical delivery, and the deed took effect therefrom.

If a parol agreement that the deed should be transmitted to Boston existed, such transmission was not necessary to complete the delivery; that agreement was separate and collateral, and its violation was no breach of this covenant. If it be asked why such an agreement to send the deed to Boston should be made, it may be answered that it is of great importance to the grantee, to have the authentic evidence of title in his own possession, for his greater security.

In the case of *Maynard v. Maynard*, 10 Mass. 456, the deed was delivered to the subscribing witness, to be carried to the register of deeds by a father, without the knowledge of the son, and without any authority given to the register to give it to the son. Both subsequently occupied the land together, without any act done to divest their joint possession of its equivocal character. The deed was duly recorded, and returned to the witness, who retained it till the son died. The father then took it back, and cancelled it. It was held that, although registered, it did not operate as a deed, for want of delivery.

Barrett & others v. Union Mutual Fire Insurance Company.

But if delivered to a third party for the use of the grantee, on a future event, it is a good delivery presently. *Wheelwright v. Wheelwright*, 2 Mass. 447; *Foster v. Mansfield*, 3 Met. 412. So, if delivered to the register to be recorded, and then to be given to the grantee, and he assent, it is a good delivery from the time of such assent. *Hedge v. Drew*, 12 Pick. 141. If the first delivery of the deed to the register, was made by the request or direction of the plaintiff, it was the delivery to give effect to the instrument as a deed, and, speaking technically, no other delivery could be made. *Mills v. Gore*, 20 Pick. 28.

The verdict must be set aside, and a new trial ordered, unless the plaintiff consents to become nonsuit.



JOSEPH BARRETT & others vs. THE UNION MUTUAL FIRE
INSURANCE COMPANY.

The by-laws of a mutual fire insurance company having provided, that any policy, issued by the company to cover property previously insured, should be void, unless the previous insurance should be expressed in the policy at the time it was issued; it was held that a policy, issued by the company, and made in terms subject to the conditions and limitations of the by-laws, in which policy a previous insurance on the property was not expressed, was void, even in the hands of an assignee without notice of the defect; although the insurers knew of the existence of such prior insurance, and of the intention of the assured that it should remain in force, and assented thereto; and although the policy was prepared by the insurers and delivered to the assured, as he supposed, pursuant to his said intention, without any knowledge on his part that the prior insurance was not mentioned therein; and although the amount insured by the policy, together with the amount of such prior insurance, did not exceed the value of the property insured.

It seems that an order indorsed by the assured on a policy issued by a mutual insurance company, to "pay the within in case of loss" to a mortgagee of the property insured, and assented to by the company, will enable the mortgagee, in case of loss, to maintain an action on the policy in his own name.

THIS was an action of assumpsit by the plaintiffs, as the commissioners of the sinking fund of the Western Railroad Corporation, against the defendants, a mutual fire insurance

company, established in Boston, on a policy of insurance against fire, originally issued in favor of Henry W. Nelson, and payable, in case of loss, to Josiah Quincy, Jr.

The policy witnessed that, in consideration that said Nelson, a member of the corporation, "agreeably to the by-laws of said company, hereunto annexed," had paid a certain sum and had bound and obliged himself to pay all sums assessed upon him, pursuant to the by-laws, he was insured on certain buildings therein described, against loss or damage by fire, under the conditions and limitations expressed in the by-laws, and subject to the lien given by the thirty seventh chapter of the revised statutes upon the buildings and the land under and belonging to the same, the sum of \$2600. In the margin of the policy, was a memorandum that \$2600 on the same premises was insured with the State Mutual Fire Insurance Company.

The charter and by-laws of the defendants were annexed to the policy. The fourteenth article of the by-laws provided, in conformity with the Rev. Sts. c. 38, § 28, that "not more than three fourths of the value of any building shall be insured by this company, and as much less as may be agreed upon." The fifteenth article provided as follows: "All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it be issued."

On the policy was indorsed a relinquishment, by Josiah Quincy, Jr., of his interest therein, and also the following: "Pay the within, in case of loss, to the commissioners of the sinking fund of the Western Railroad Corporation, as mortgagees. H. W. NELSON. Consent, ENOCH HOBART, President."

At the trial before the jury, on the opening of the plaintiffs' case, it appeared that at the time of the execution and delivery of the policy in suit, there was a prior insurance in favor of Henry W. Nelson, then existing and in force, and intended to be kept in force, to the amount of \$2000.

Upon this fact appearing, the defendants insisted that as it was not mentioned in this policy, the policy was void by the

terms of it, according to the by-laws of the defendants referred to therein.

In answer to this ground of defence, the plaintiffs offered to prove by parol, that the fact of the existence of such prior insurance and its amount, and the understanding of the party insured, that such prior insurance was to stand and remain in force upon the property, were made known to the defendants, and assented to by them, prior to the making of this policy, and pending the negotiation therefor, and down to the time of the execution and delivery thereof; that this policy was prepared by the defendants, and delivered to the assured, as he supposed, in execution of and according to the intention aforesaid; that he did not read the policy at the time of taking it, nor afterwards; that nothing was said to him about the fact of such prior insurance not being stated in it, and that neither he nor the plaintiffs knew that such fact was not stated in the policy, until after the loss; and that the amount agreed to be insured by the defendants and by the State Mutual Company, mentioned on the margin of the policy sued upon, together with the amount of such prior insurance so notified to the defendants, did not exceed the value of the property insured. The defendants objected that such testimony was incompetent and inadmissible.

It was agreed that after the application for insurance in the present case, the president of the defendants, and the president of the State Mutual Fire Insurance Company (which gave a similar policy,) examined the buildings to be insured, and informed the applicant that the amount of \$5200, insured by both policies, was the highest valuation which they could put upon three fourth parts thereof, and was therefore all the risk which they could take upon the same.

The case was submitted upon the foregoing statement, with the agreement that if the court should be of opinion, that the foregoing evidence would be competent, the case was to be sent to a jury upon the facts; but if the court should be of a different opinion, or that the plaintiffs could not maintain any action on this policy, by reason of their not being in law members of the company, or insured by the policy declared on, or

otherwise, then the plaintiffs were to become nonsuit, and judgment be rendered for the defendants.

R. Choate and Ellis G. Loring, for the plaintiffs. 1. This action is properly brought in the name of the parties to whom the policy is payable. *Delaware & Hudson Canal v. Westchester County Bank*, 4 Denio, 97; *Smith v. Atlantic Mutual Fire Ins. Co.* 12 Law Reporter, 408; *Farrow v. Commonwealth Ins. Co.* 18 Pick. 53, 56; 3 Bos. & Pul. 149, note; *Jessel v. Williamsburgh Ins. Co.* 3 Hill, 89; *Fuller v. Boston Mutual Fire Ins. Co.* 4 Met. 206, 209.

2. The failure to insert the fact of the prior insurance should not prejudice the plaintiffs, who are assignees without notice. *Charleston Ins. Co. v. Neve*, 2 McMullan, 237.

3. The evidence offered was admissible, on the ground that the acts of the defendants induced a reasonable belief on the part of the assured that the prior insurance was inserted in the policy, or its omission waived. The defendants, therefore, should be estopped to set up this defence, or the evidence should at least have been left to the jury, as they might find the omission to state the prior insurance under the circumstances a constructive fraud, which would let in evidence to prove the parol contract. 1 Story on Eq. §§ 187, 193, 258, 330, 385, 391; *Jenkins v. Eldredge*, 3 Story R. 181; *Flagler v. Pleiss*, 3 Rawle, 345; 3 Stark. Ev. (4th Amer. ed.) 1015, 1018, 1019; *Doe v. Allen*, 8 T. R. 147; 2 Smith Lead. Ca. (3d Amer. ed.) Hare & Wallace's note, 531; *Gregg v. Wells*, 10 Ad. & El. 90, 98, and cases cited; *Ivers v. Chandler*, 1 Chip. 48; *Stephens v. Baird*, 9 Cow. 274; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154; *Coggs v. Bernard*, 1d. Raym. 909; *Foster v. Essex Bank*, 17 Mass. 479; *Doorman v. Jenkins*, 2 Ad. & El. 256, 261, 262.

C. G. Loring, for the defendants, cited, to the point that parol evidence was inadmissible to prove the defendants' knowledge of, and assent to the prior insurance, *Holmes v. Charlestown Mut. Fire Ins. Co.* 10 Met. 211; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495; *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75; *Higginson v. Dall*, 13 Mass. 96; *Whitney v. Haven*, 13 Mass. 172; *Parks v. General Ins.*

Barrett & others v. Union Mutual Fire Insurance Company.

Ass. Co. 5 Pick. 34; Weston v. Emes, 1 Taunt. 115; Flinn v. Tobin, Mood. & Malk. 367; Meres v. Ansell, 3 Wils. 275.

FLETCHER, J. It is maintained by the defendant, that this policy is void, because there is no mention in it of the prior policy of \$2000, as is expressly required by the fifteenth article of the by-laws to which reference was made in the policy. That the existence of this prior policy was a very material fact, there can be no doubt.

The defendants are restrained by their own by-laws, as also by the statute, from insuring more than three fourths of the value of any building; for the purpose, and with the design, of leaving the insured his own insurer for the remaining quarter part. It is manifestly important to the insurers, that the insured should thus have a common interest with them in the preservation of the property. It is therefore expressly provided, by the fifteenth article of the by-laws of the defendants, that all policies issued by them upon property previously insured shall be void, unless such previous insurance is mentioned in the policy at the time it is issued. These by-laws of the defendants are annexed to the policy, and are expressly referred to as proving the conditions and limitations upon which the insurance is made, and thus expressly form a part of the contract of insurance. Now, in point of fact, at the time when this policy was issued, there was a previous insurance which was not expressed, nor in any way mentioned or referred to in the policy. By its own express terms, therefore, this policy is void. The position, that the policy is thus void, upon the facts stated, is sustained by numerous and decisive authorities. *Jackson v. Mass. Mut. Fire Ins. Co. 23 Pick. 418; Liscom v. Boston Mut. Fire Ins. Co. 9 Met. 205; Holmes v. Charlestown Mut. Fire Ins. Co. 10 Met. 211; Roberts v. Chenango County Mut. Ins. Co., 3 Hill, 501; Carpenter v. Providence Washington Ins. Co. 16 Pet. 495; Jennings v. Chenango County Mut. Ins. Co. 2 Denio, 75.* In truth, the counsel for the plaintiffs do not deny, but admit, that the policy is void, unless the omission to state the previous insurance in the policy can be supplied or remedied by parol evidence. The principal question therefore in this case is, whether or not

the parol evidence offered by the plaintiffs for this purpose was admissible. The decision of this question depends upon a very familiar and well settled principle of law. It is a general rule, that parol evidence can never be received to contradict or materially vary the terms of a written agreement. This is undoubtedly a wise and salutary rule, though if it be understood in too literal and broad a sense, it may exclude the admission of parol evidence, in cases in which it is usually received, to justify a construction which could not otherwise have been adopted. In all cases, where a sensible interpretation can be put upon the policy without the aid of parol evidence, the effect of such evidence is materially to vary the legal construction of the contract of the parties.

The true meaning of the rule excluding parol evidence is, that such evidence shall never be used to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words they have used, upon any construction, will admit or convey. In the present case, it is quite clear that the parol evidence is offered to show that the intention of the parties was substantially different from any meaning, that the words they have used, upon any construction, will admit or convey. The manifest effect was to substitute an oral contract for that which is contained in the written instrument. The evidence was not offered for the purpose of aiding in putting a construction upon the policy, as it is, according to its true intent and meaning; but to show that the intention of the parties was materially different from any meaning, that the words which they have used, upon any construction, will admit of or import. This would in fact be substituting an unwritten in the place of the written contract; the unwritten differing essentially from the written one.

It was said in the argument, that there was a mistake or fault, on the part of the defendants; that the policy was prepared by the defendants; and that they should have expressed in it the prior policy, and omitted to do so by design or by wilful negligence; and that the assured did not read it, but supposed that the prior policy was expressed. The assured

certainly had abundant opportunity to read the policy, and need not have accepted it, if it was not satisfactory to him, according to the agreement of the parties. If the assured accepted the policy, without looking at it, or knowing what it was, he would seem himself to be liable to the charge of culpable negligence made against the defendants. But if from mistake or fraud an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act on the agreement as it is; it cannot strike out or change any part or add any thing to it, so as to contradict or vary the agreement contained in the written instrument. The parol evidence offered in this case was therefore clearly not admissible; and taking the policy as it is, the plaintiffs cannot recover. The plaintiffs, being assignees of the policy, can have no better right to recover than the original party insured.

It is unnecessary to decide the question, whether the plaintiffs can maintain this action in their own name. But as the plaintiffs had an insurable interest in the property, and took the policy with the consent of the defendants to pay the loss to them, there would not seem to be any reason why they should not recover the loss, in this form of action. But if they could not recover in this form of action on the policy, it would seem that they might recover in their own names upon a proper count upon the express promise of the defendants to pay the loss to them, if the defendants were liable to pay the loss to any one.

Plaintiffs nonsuit.

HORATIO WOODMAN vs. MARY E. SALTONSTALL. SAME vs.
GEORGE H. SAUNDERS.

A bill in equity, brought by the assignee of an insolvent debtor, praying that the defendant, to whom such debtor has made a conveyance of land, for the purpose of giving an unlawful preference, may be ordered to give up the deed, and re-

lease the land to the assignee, shows that the plaintiff has a plain, adequate, and complete remedy at law, by a writ of entry, and this court therefore have no jurisdiction under St. 1838, c. 163, § 18, although a discovery is prayed for; for a discovery might be had in aid of proceedings at law.

THESE were bills in equity, brought by the assignee in insolvency of Richard Saltonstall, in each of which the plaintiff averred that the said Richard made a promissory note payable to the defendant, who endorsed the same for his accommodation, and that he, knowing or believing himself to be insolvent, and in contemplation of petitioning for the benefit of the insolvent law, and for no legal consideration, conveyed certain real estate to the defendant, to secure the defendant against liability upon said endorsement, in order to give the defendant a preference over his other creditors, in fraud of the insolvent law; and that such conveyance was accepted by the defendant, knowing or believing, or having reasonable cause to believe, the said Richard to be insolvent; and that such conveyance was therefore fraudulent and void as to other creditors. The prayer of the bill in each case was, that forasmuch as the plaintiff was remediless at law, and could not have adequate relief save in a court of equity, the defendant might answer upon oath, and especially to certain interrogatories stated in the bill; and that the defendant might be decreed to release and convey to the plaintiff the estate so conveyed, and to deliver up the deed to be cancelled.

The defendant in each case demurred generally for want of equity in the bill, alleging that the plaintiff had a full, adequate, and complete remedy at law; and, not waiving the demurrer, answered, admitting the making of the notes and their endorsement for the benefit of said Richard, and the conveyance by him, but denying that the defendant knew or believed, or had reasonable cause to believe him insolvent.

J. A. Andrew, for the plaintiff.

N. J. Lord, for the defendants.

SHAW, C. J. We are of opinion that our chancery powers under the insolvent laws should not be exercised, unless it appear that the remedy at law is inadequate. *Thayer v. Smith*, 9 Met. 469. The only distinction suggested by the plaintiff's

Massachusetts Iron Company v. Hooper & others.

counsel between that case and the present, is, that here the bill prays for a discovery. The plaintiff in that case waived an answer on oath, and his bill presented only an ordinary case of fraudulent conveyance, suitable for investigation in a real action by common law evidence. It was there argued, as a ground for jurisdiction, that the court might order the fraudulent deed to be delivered up, and thus remove a cloud upon the title; but it was suggested that nothing could more effectually clear the title than a judgment at law. The fact, that an answer is required on oath in the present case, is not sufficient to distinguish this case from that of *Thayer v. Smith*; and if the plaintiff's remedy is properly at law, a discovery may be had in aid of his other evidence. Cases may be imagined, indeed, where the interposition of chancery powers would be desirable; as where the title had gone through several changes, and several parties were insolvent, whose consciences it would be necessary to search. The powers of a court of equity ought not to be resorted to, unless a special case is made by the bill, showing that, for the reasons specifically set forth, the plaintiff has no adequate and complete remedy at law. But where no transfer has been made by the supposed fraudulent grantee, and no question of notice to a third person arises, the proper remedy is by a common writ of entry against the grantee. And in general, without a sufficient ground stated in the bill, showing the necessity for the exercise of chancery powers, a bill in equity will not lie.

Bill dismissed without prejudice.

THE MASSACHUSETTS IRON COMPANY vs. ROBERT HOOPER
& others.

A creditor of an insolvent debtor, claiming a lien on certain property of the debtor, may apply to this court, exercising the chancery powers conferred by St. 1838, c. 163, § 18, to have such a lien declared in his favor, without first proving his debt against the debtor's estate.

G. and his associates, having been incorporated by act of the legislature as a manu-

Massachusetts Iron Company v. Hooper & others.

facturing corporation, met and agreed to accept the act, and fixed the proportions in which the shares should be distributed, and also agreed that the corporation should purchase certain lands of G., with the buildings and machinery thereon, then unfinished, but to be completed by G. The corporation was afterwards organized, and G. conveyed the lands to them; but before he had finished the buildings, and machinery, or had paid all the instalments on his shares, and before any certificates had been issued to him, he became insolvent, and proceedings in insolvency were instituted. It was held that the corporation had no lien on the shares of G. for sums expended by them, before or after he became insolvent, in finishing said buildings and machinery.

SHAW, C. J. The petitioners, a corporation established by law, apply to this court, exercising the powers vested in them by the insolvent laws, in the nature of a summary proceeding in equity, to revise a decision of the master in chancery, made in the proceedings in insolvency pending before him, in the case of Horace Gray and Nathaniel Francis, insolvent debtors.

The substance of the petition to the master was, that the Massachusetts Iron Company was incorporated by an act passed in March, 1847; that between that time and the actual organization, which took place on the 5th of May, 1847, to wit, on the 26th of March, 1847, it was agreed between said Horace Gray and Benjamin T. Reed and others to accept the act, to fix the amount of the capital stock at \$300,000 and the proportion in which it should be taken and held by the associates, and to organize the corporation and carry on the business, for which it was established; that Gray agreed to take 150 shares at \$1000 each, and the other associates and parties to take severally different sums, amounting in the whole, to \$150,000, being the whole amount; and it was a part of the agreement, that the company to be organized should purchase, and Gray should sell to them, his estate at South Boston, with the buildings he was then erecting thereon, with fixtures and machinery specified, for the sum of \$200,000, he to complete, finish, and furnish the same in the manner described. It appears that pursuant to this agreement, the company was organized on the 5th of May; and on the 15th of May, Gray executed a deed conveying the said estate to said corporation, but the buildings, fixtures and machinery, were not

Massachusetts Iron Company v. Hooper & others.

then complete; that the company expended large sums stated, to finish and complete the work Gray had stipulated to do; also that Gray paid \$130,000 and over towards his shares of \$150,000, but that \$18,000 and more still remained due on the shares, when Gray became insolvent and these proceedings were instituted, in November, 1847. No certificate of shares had been issued to Gray, when he became insolvent. The prayer of the petition of this company to the master was, to have a lien on his shares declared in their favor, not only for the arrears due on the shares, but also for all the sums which they had been compelled to pay, either before or after Gray so became insolvent, to complete the said buildings and furnish the same, which Gray, by virtue of his contract, ought to have done; and they deny that the assignees, or any other person claiming under Gray can equitably claim the benefit of such shares, or sell or dispose of the same, until the company are first repaid the sum due to them as aforesaid, and which Gray ought to have paid.

The answer of the assignees admits most of the facts. It admits that the company have a lien on the 150 shares, for the arrears of assessment; that is, it admits, that the company have the right to sell a sufficient number of said shares to pay those arrears, if not otherwise paid, but denies that such a lien can be declared or enforced by this process. It denies that the company can claim a lien, in any form, on these shares for any sums due the company by contract; it denies that the company was a party in form to the agreement referred to, which preceded the organization, and insists that whatever balance is due from Gray to the company, is a debt to be proved in common form.

The master decided against the allowance of the petition; and this is a petition to this court in nature of an appeal from that decision.*

The first ground of objection to the petition is, that the

* The petitioners' counsel cited *West v. Skip*, 1 Ves. Sen. 239, 242; *Dyer v. Clark*, 5 Met. 572, 575; *Collyer on Partn.* (Perk. ed.) § 125; *Foss v. Harbottle*, 2 Hare, 461, 489; *Parsons v. Spooner*, 5 Hare, 102, 109; *Gray v. Portland Bank*, 3 Mass. 364, 379.

company have proved no debt against the insolvents, and are therefore not creditors entitled to prosecute this petition. But we can perceive no force in this objection. The petitioners describe themselves as creditors standing in a particular relation, holding claims which they insist are not to be proved as ordinary debts, but to be provided for out of a particular fund indicated; and the very purpose of their application is, to call on the court to decide, whether they are not so entitled to claim.

2. The next question arises upon the effect of the agreement entered into before the organization, and specially set forth and annexed to the petition. This was an agreement amongst eleven individuals, of whom Gray was one, to the effect that they would accept the act of incorporation, proceed to act under it, and distribute and hold the stock amongst themselves, to the amount and in the proportions stated. The court are of opinion, that this was an agreement of the individuals with each other, in regard to the taking and apportionment of shares in the capital, to which the company was not a party. This agreement had its full completion in the organization of the company; or, if there was any failure, the remedy was to be sought against those who failed of performance, by those with whom the contract was made. The rights and liabilities of the parties to and amongst each other, and of each with the corporation after the organization, depended upon the relation subsisting between the corporation and its members. The agreement did not contemplate a partnership in any event. If it was carried into effect, and a corporation was organized, their rights would then be determined by the law regulating corporations. If not carried into effect, and no corporation should be organized, the agreement would be void.

3. The question then arises, whether this preliminary agreement, made amongst and between the individuals before the organization, could be so far regarded as a contract with the company when incorporated, that they could maintain any suit at law or in equity upon it? But it seems not necessary to decide that question; because, supposing the agreement

made after the organization of the company, could it be enforced as an agreement with them? It appears to us quite clear, that it was an executory agreement only, resting in provisions, for which Gray may perhaps have been liable on his personal responsibility; but it created no lien on his shares. The shares did not then exist; he had a right, as between him and his associates, to have the shares assigned; but the shares did not exist as property until the company was organized and the shares were assigned to and accepted by him.

Had these persons, by their agreement, proposed to form a partnership instead of a corporation, there might have been in effect a lien upon the shares in favor of the partners, before the separate creditors could claim the shares as separate property. This results from the difference in the relations between a partnership and the individuals who compose it, on the one hand, and a corporation and its members, on the other. Upon the separate insolvency of a partner, his assignees commonly claim his interest in the partnership effects, after an account, in which his share in the capital would stand charged with all sums due from him to the firm. He has no share, in fact, until all his dues are paid.

But a corporation is a body politic, and a distinct person in law from all its members, so created for the express purpose of being a distinct and independent existence and capacity in legal contemplation, so that the corporation may contract or be contracted with, sue or be sued, by any one of its members.

In a partnership, the partners own the property specifically, as joint tenants, *per my et per tout*; but in a corporation, no member has any specific interest or right of property in the money, goods and effects of which its stock is composed; they are the property of the corporation.

Shares in a corporation are regarded as a distinct estate, saleable, and transferable, and attachable, as personal property. Banks have sometimes provided, by a special by-law, that all shares of stock shall be deemed hypothecated to the bank for any debt, the bank to hold the shares without a specific pledge. *Nesmith v. Washington Bank*, 6 Pick. 324;

Fay & another v. Noble & others.

Plymouth Bank v. Bank of Norfolk, 10 Pick. 454. The practice usually is, to take a specific pledge. Here there is no suggestion that the shares of the insolvent were pledged by any by-law or any specific pledge. An insurance office has no implied lien on the shares of a stockholder, for debts due the company, and cannot hold them against the purchaser or attaching creditor. *Sargent v. Franklin Ins. Co.* 8 Pick. 90. We know of no distinction, in this respect, between an insurance company and a manufacturing company.

4. Another ground taken by the petitioners is that, as no scrip or certificate of shares had been issued, Gray had no more than an equitable right to the stock, which could only be enforced by first paying all which was due to the company from him. But the court are of opinion that this is not tenable. Shares are recognized as separate property, assignable and attachable as the distinct property of the owner. An assignment and distribution of shares made by the company and entered on their books, and an assent by the stockholders, especially where that assent has been manifested by the decisive act of paying instalments on them, vests the title in the shareholder. A certificate is evidence only, and not necessary to complete the title. They may be taken and held on execution, though no certificate has issued. *Hussey v. Manufacturers' & Mechanics' Bank*, 10 Pick. 415.

The court are of opinion, that the Massachusetts Iron Company have no lien on the shares of Gray for any balance due, for completing, finishing and furnishing the mills and works, or for money due on general account; and, therefore, the decree of the master, dismissing their petition, must be affirmed.

B. R. Curtis, for the petitioners.

C. G. Loring and *F. C. Loring*, for the respondents.

FRANCIS B. FAY & another vs. JOSEPH NOBLE & others.

The subscribers for and holders of stock in a manufacturing corporation which has been defectively organized, and transacted business under such defective

Fay & another v. Noble & others.

organization, do not thereby become partners, general or special, in such business; and the records of such supposed corporation are not admissible against the members, as evidence of any agreement or understanding among them as to their own rights and liabilities as members of a partnership, or of the extent of authority given to their general agent, as agent of a partnership.

THIS was replevin for seventy two tons of pig iron. The defendants pleaded the general issue, and specified in defence a title in themselves under a mortgage from the West Boston Iron Company.

At the trial in the court of common pleas, before *Wells, C. J.*, the following facts were in evidence: Prior to May, 1848, Leonard Fuller and one Kendall owned and carried on at Boston a machine shop and an establishment for making iron castings. On the 22d of March, 1848, they, with others, were incorporated as a manufacturing corporation, under the name of the West Boston Iron Company, for the purpose of carrying on the same business (*St.* 1848, c. 70, 8 Special Laws, 879); and in May, 1848, attempted to and supposed they did organize as such corporation; and Fuller and Kendall then transferred the real and personal estate employed by them in said business to the corporation, receiving payment therefor in shares of stock in the corporation. The shares so received by Fuller amounted to more than three fourths of the whole number of shares, into which the capital stock purported to have been divided. From the time of this supposed organization until November, 1848, Fuller acted as the general agent of the company, and, on the 25th of September, 1848, purporting to act in that capacity, borrowed money of the plaintiffs, gave the note of the company therefor, and conveyed the pig iron in question to the plaintiffs, as collateral security for its payment.

The plaintiffs put into the case the records of said supposed organization, and of the proceedings under the same; and contended that, from an inspection of these records, it appeared the company had not been legally organized as a corporation; and so the court ruled, against the objection of the defendants. Two witnesses, called by the plaintiffs, testified, in answer to questions by the defendants, that the proceedings

Fay & another v. Noble & others.

therein recorded were truly set forth. To this evidence the plaintiffs objected; but the judge admitted it as evidence of the actual agreement of the associates among themselves, whether they were to be regarded as corporators, as partners or otherwise, as to the manner in which the business should be transacted, and of the extent of the authority given to Fuller as their agent.

In November, 1848, a reorganization of the company, as a corporation, took place; and, on the 14th of that month, the corporation, so reorganized, conveyed all their property to the defendants, by the mortgage relied on by the defendants, who took possession, under this mortgage, of the iron in controversy.

The plaintiffs requested the judge to instruct the jury, among other things, that, as there had been no legal organization of the corporation at the time of the conveyance to the plaintiffs, the parties then holding shares therein, and conducting the business for their common benefit, were in law to be deemed partners, and could not, by any agreement among themselves, limit the power of the members as such, so as to affect the plaintiffs, unless knowledge of such limitation was brought home to the plaintiffs, the burden of proving which was on the defendants; that Fuller, as one of the partners, and the managing partner and principal owner, had full powers to give the notes of the company to raise money, and pledge their property for the payment thereof; and that, although Fuller dealt with the plaintiffs as agent, they were not estopped to show and avail themselves of the fact, that he was actually a partner and principal owner.

The presiding judge submitted the case to the jury, with instructions upon this point, of which the following is the material part:

“The proceedings, prior to November, 1848, did not prove a legal organization of the corporation, and consequently no corporate acts were done prior to November, 1848, when the new organization was effected. But, although not acting as a corporation, the individual associates were acting as an association connected together for the purpose of carrying on

Fay & another v. Noble & others.

business; this association was not necessarily a partnership, with the usual powers and liabilities of a partnership, but it was a question of fact what were the terms of this agreement of association; and it being testified and proved, that the writings offered as records of the corporation contained a true statement of the acts of the associates, these writings were admissible evidence to prove the actual agreement of the associates as between themselves; and it was for the jury, from this and other evidence, to determine what this agreement of association was. If it was a partnership, without any limitation as to the powers of the individual members, each partner had a right to bind the partnership by a contract made for partnership purposes; and, among other powers, had a right to borrow money in the name of the partnership, and pledge the partnership property as security for repayment. It was, however, competent for partners to limit the powers of individual members of the company, by an agreement that the conduct of the business should be confided wholly to the management of agents chosen for that purpose; and where this was done, a partner not selected as agent could not bind the company by an agreement with an individual who knew the fact, that the power of transacting the business of the concern had been delegated to these agents."

The jury returned a verdict for the defendants, and the plaintiffs excepted.

G. M. Browne, for the plaintiffs.

S. Bartlett and *D. Thaxter*, for the defendants.

BIGELOW, J. Upon the evidence introduced at the trial of this case in the court below, the presiding judge ruled that, prior to November, 1848, there was no legal organization of the corporation called the West Boston Iron Company, and therefore no corporate acts were done prior to that time. The whole case was tried and submitted to the jury on this assumption. As this point was so ruled at the request of the plaintiffs, and as the verdict was in favor of the defendants, no exception was taken thereto, and we are not called upon to determine its correctness.

The plaintiffs contended and asked the court to rule, that, inasmuch as there had been no legal organization of said corporation prior to November, 1848, the parties holding shares in said unorganized corporation were in law to be deemed copartners, and subject to all liabilities as such. The court did not give this precise instruction to the jury; but directed them in substance, that said parties, by virtue of their being subscribers for and holders of stock in said company, were either general copartners, with the usual powers and liabilities as such, or copartners acting under certain restrictions and limitations as to the rights and duties of individual members, and through an agent with limited authority; and it was left to the jury to determine upon the nature and character of this copartnership, and also the authority of Fuller, as agent or copartner, to act in its behalf.

It seems to us, upon a careful consideration of the case, that these instructions were not warranted by the facts proved; and although they do not form the precise ground of the exceptions taken by the plaintiffs, yet we think them so erroneous, as to render it necessary to order the case to a new trial.

We are not aware of any authority, certainly none was cited at the argument, to warrant the instruction, that, in consequence of an omission to comply with the requisitions of law in the organization of a corporation, by which its proceedings were rendered void, persons who had subscribed for and taken stock in the company, thereby became copartners. The doctrine seems to us to be quite novel and somewhat startling. Surely it cannot be, in the absence of all fraudulent intent, (and none was proved or alleged in this case,) that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners; a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. No such result can follow, unless a principle of law be established, founded on no authority, and required by no public exigency. Corporations are known and recognized legal entities, with rights and powers clearly de-

finer and well understood, and wholly distinct and different from those of individuals and copartnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities, which they voluntarily assume, and these liabilities are not to be extended and enlarged, so as to affect innocent parties, beyond the letter of the law. A copartnership cannot take upon itself the functions of a corporation, nor can a corporation or its members be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. The personal liability of the members of a joint stock company or copartnership is inconsistent with the character and nature of a corporation, of which the law properly recognizes only the creature of the charter, and knows not the individuals. Ang. & Ames on Corp. 535, 536. On looking into Rev. Sts. c. 38 and 44, to the provisions of which the corporation in question was made subject, we find various enactments by which officers and members are made individually liable for debts contracted by corporations, in case of non-compliance with certain requisitions; but no provision is made by which such individual liability attaches, by reason of any omission to organize in the manner prescribed by law. The statute, it is true, prescribes the mode of organization, but it annexes no penalty or liability to the neglect or omission to comply with it. We are unable to see, therefore, any principle of law, upon which the instructions given to the jury on this point can rest.

It follows, as a necessary consequence of what we have already said, that the records of the corporation were improperly admitted and submitted to the jury, as evidence of an agreement or understanding among the shareholders in the corporation, as to their own rights and liabilities as members of a copartnership, and of the extent of authority given to Fuller, as agent of such copartnership. They were not made or kept for any such purpose. They were only the records and by-laws of a corporation, not the agreements of individuals, in the nature of articles of copartnership; and they could have no legitimate tendency to prove the facts for which they were offered and used at the trial.

Fay & another v. Noble & others.

Without examining at greater length the rulings of the court set out in the bill of exceptions, we think it manifest, that the whole trial proceeded under a misapprehension. If the court were correct in deciding, that there was no organization of the corporation, and that all its proceedings were void, the case resolved itself into a few simple elements. Being unorganized, and incompetent to act as a corporation, it could not create agents, or confer any authority on any one to act in its behalf, and therefore all those, who acted or purported to act as its agents, were acting without authority. There was no principal to appoint an agent. It is a familiar principle of law, that a person who acts as agent without authority or without a principal, is himself regarded as a principal, and has all the rights and is subject to all the liabilities of a principal. Story on Agency, § 264. If a person, purporting to act as agent of a corporation, which had no valid legal existence, makes contracts and does other acts as its agent, he becomes the principal, and is personally liable therefor. If he purchases property, as agent, without authority, the title vests in him, so far at least as regards third persons, and he has the sole right to dispose of it to others. Story on Agency, § 264 *a*, note; *Hampton v. Speckenagle*, 9 S. & R. 212.

Applying this principle to the case at bar, it is very clear, that Fuller was not the agent of a copartnership, for none existed; he was not the agent of individuals, as such, because he was not authorized so to act; he was not the agent of the West Boston Iron Company, because if the court were right in deciding that it had never organized, and that its proceedings were void, it never had the power to appoint him agent. Clearly, then, he acted without authority from any one. If he purchased, he purchased for himself. In him only did the property vest, and as against all but the vendors, he had the sole right to dispose of it to others. In this view, the question of copartnership, which was submitted to the jury, was wholly immaterial, and diverted their attention from the real point in issue. We are therefore of opinion that there was a mis-trial, and that the verdict must be set aside, and a new trial had at the bar of this court.

RICHARD SALTONSTALL vs. THE PROPRIETORS OF THE BOSTON PIER OR LONG WHARF. LEVERETT SALTONSTALL vs. THE SAME. WILLIAM R. GOULD, JR., & Wife vs. THE SAME. JAMES C. MERRILL & Wife vs. THE SAME. ISAAC R. HOWE & others vs. THE SAME.

A grant of land, bounded "on the sea or flats," passes the flats appurtenant to the land granted.

In construing a deed of land, bounded "easterly on the sea or flats," a lease for years, made to the grantee by a former proprietor, and continuing at the date of the deed, of a shop standing on the land conveyed, and bounded "easterly on the sea or flats of the lessor," if admissible in evidence, has no tendency to prove that the flats appurtenant to the upland were not included in the deed.

THESE were writs of right, dated the 27th of February, 1849, in which the demandants, as the grandchildren and heirs at law of Nathaniel Saltonstall, claimed portions of the wharf and flats in Boston in possession of the tenants, as set forth in their respective writs; and were submitted to the court upon the following statement of facts:

The demanded premises were originally flats appurtenant to the possession of William Hudson, described in the Book of Possessions as "one house and yard, bounded with the street on the north, the bay on the east, Mr. Winthrop on the south, and Wm. Davies, Senior, west."

In 1678-9, Governor John Leverett died seised of the premises. In the division of his estate among his devisees, made on the 4th of September, 1707, "a piece of land and wharf at the bottom of the Town House Street, butting on the house in the occupation of Mr. Andrew Faneuil, merchant, with three warehouses and one cooper's shop thereon, together with a parcel of flats before the said wharf and thereunto belonging," were set off to Elisha Cooke and his wife, (a daughter of Governor Leverett,) and their son Elisha Cooke, Jr., (who had purchased the share of another daughter of Governor Leverett.) On the 13th of April, 1715, Elisha Cooke and wife, conveyed to Elisha Cooke, Jr., their interest in the estate so set off, describing it as "the aforesaid piece or parcel of land, and a wharf, warehouses, shops, and buildings thereon standing, and

the flats before the same," "fronting northerly on Town House Street, extending from the easterly side of the dwelling house in said Fanueil's possession into the cove or salt water." Elisha Cooke, Jr., died in 1737, and in the division of his estate, accepted by the probate court, November 4, 1763, there was set off, together with other estates, to his son Middlecott Cooke, "a wooden building in the occupation of Joseph Wheeler," "with the flats running down eastwards to low water mark, bounded north in the front on King Street, easterly on the sea or salt water, southerly on Benjamin's Peck's land, and westerly on the warehouse in Joshua Winslow's possession." Middlecott Cooke died in 1771, and by his will devised to his nephew, Nathaniel Saltonstall, "my warehouse in King street, now in possession of Mr. Isaac Winslow; as also the shop adjoining the same with all the flats before it, as set off in the division of my father's estate." The documentary evidence above set forth was put in by the demandants.

Nathaniel Saltonstall, under whom the demandants claim, on the 27th of December, 1771, conveyed to Caleb Loring by warranty deed, under which the tenants claim, "a certain piece of land situate at the lower end of King Street, in Boston aforesaid, on the south side thereof, bounded northerly on said street, there measuring thirteen feet six inches, easterly on the sea or flats, southerly or in the rear on land or flats now or late belonging to Mr. Peck, and westerly on the warehouse and land of me, the said Nathaniel Saltonstall, measuring in depth from front to rear forty eight feet, be said measures little more or less, or however otherwise bounded, together with the buildings on said land, with all the privileges and appurtenances thereunto belonging."

The demandants offer in evidence, to aid in the construction of this deed, two leases from Middlecott Cooke to Caleb Loring, of "a certain shop situate and being in King Street in Boston aforesaid, near the Long Wharf, bounded northerly upon King street aforesaid, westerly on the warehouse in possession of Joshua Winslow, Esquire, southerly upon Peck's wharf, so called, easterly upon the sea or flats belonging to said Cooke." One of these leases was dated September 25, 1758, and the

other March 25, 1765; the first for seven years, and the second for ten years from its date. The tenants deny that these leases are competent evidence for the purpose for which they are thus offered, and the question is submitted to the court, with the agreement that all the documentary evidence introduced by the demandants is to be used only, if at all, in aid of the construction of the deed from Saltonstall to Loring.

If, under this deed, the flats by law appurtenant to the premises described therein, or to the upland of which they were originally a part, passed, a verdict is to be entered for the tenants in each case, and judgment rendered thereon, with costs; otherwise, this statement is to be discharged, and the cases stand for trial.

C. G. Loring and *B. R. Curtis* for the demandants. 1. The deed from Saltonstall to Loring did not include the flats in question. 4 Cruise, (Greenl. ed.) 334, note 1; *Corbin v. Healy*, 20 Pick. 514; *Herrick v. Hopkins*, 10 Shep. 217; *Williston v. Morse*, 10 Met. 17, 27; *Law v. Hempstead*, 10 Conn. 23; *Davis v. Rainsford*, 17 Mass. 207, 210; *Tyler v. Hammond*, 11 Pick. 193; *Mayhew v. Norton*, 17 Pick. 357; *Jackson v. Boston & Worcester Railroad*, 1 Cush. 575, 578; *Storer v. Freeman*, 6 Mass. 435; *Green v. Chelsea*, 24 Pick. 71, 77; *Dunlap v. Stetson*, 4 Mason, 349, 365; *Hatch v. Dwight*, 17 Mass. 289.

The leases were competent evidence to aid in the construction of the deed. 4 Cruise, (Greenl. ed.) 306, note 1; *Adams v. Frothingham*, 3 Mass. 352; *Rider v. Thompson*, 10 Shepl. 244; *Lunt v. Holland*, 14 Mass. 149; *Sparhawk v. Bullard*, 1 Met. 95.

S. Bartlett and *W. Sohler* for the tenants. 1. The flats in question passed by the deed from Saltonstall to Loring. *Mayhew v. Norton*, 17 Pick. 357; *Storer v. Freeman*, 6 Mass. 435, 440; *Green v. Chelsea*, 24 Pick. 71, 77; *Adams v. Frothingham*, 3 Mass. 352. Doubtful words are to be construed most strongly against the grantor. Bac. Ab. Grants, I. 1. To include the flats is the only way to give effect to both terms; we must suppose that the grantor, in using the words "by the sea" meant to include the flats to the extent allowed by the ordinance, and added the words "or flats" to take effect in

case the one hundred rods granted by the ordinance should not reach low water mark.

But even if the boundary were merely "by the flats," the flats would pass, in this case, as appurtenant to the wharf conveyed; *Ashby v. Eastern Railroad*, 5 Met. 368, 369; *Doane v. Broad Street Association*, 6 Mass. 332, 334; *Thayer v. Payne*, 2 Cush. 327; especially having been originally located with this lot, in the division of Governor Leverett's estate. *Jackson v. Boston & Worcester Railroad*, 1 Cush. 575, 580.

2. The leases are not admissible in evidence to aid in the construction of the deed. *Green v. Chelsea*, 24 Pick. 71; *Doe v. Webster*, 4 P. & Dav. 270; *Doe v. Holton*, 5 Nev. & Man. 391; *Doe v. Chichester*, 4 Dow, 65; *Webster v. Atkinson*, 4 N. H. 21; *Lowell v. Robinson*, 4 Shepl. 357; *Allen v. Kingsbury*, 16 Pick. 235. But, if admitted, they would not prove that Loring took no more by a purchase of a wharf, than by a lease of a shop from a different person.

FLETCHER, J. These are writs of right, in which the demandants claim, as grandchildren of Nathaniel Saltonstall, a portion of the wharf and flats in possession of the tenants, as set forth in the respective writs. It appears that Governor Leverett died seised of the demanded premises, and that the title passed from him through various devises, partitions and conveyances, to Middlecott Cooke, who became the sole owner in 1763. The said Cooke, in 1771, devised the demanded premises to Nathaniel Saltonstall the demandants' ancestor, under whom the demandants claim, who, on the 27th of December, 1771, duly executed a conveyance to Caleb Loring, under which the tenants claim. If, under this deed, the flats by law appurtenant to the premises described in the deed, or to the upland of which they were originally a part, passed, then by the agreement of parties, a verdict is to be entered for the tenants in each of the cases, and judgment rendered thereon, with costs; otherwise the statement of facts is to be discharged, and the cases to stand for trial.

The only question, therefore, presented for the consideration of the court, upon the statement of facts, is as to the con-

struction of the deed of Nathaniel Saltonstall to Caleb Loring. The description of the premises conveyed in that deed, is as follows: "A certain piece of land situate at the lower end of King Street, in Boston aforesaid, on the south side thereof, bounded northerly on said street, there measuring thirteen feet and six inches, easterly *on the sea or flats*, southerly or in the rear on land or flats now or late belonging to Mr. Peck, and westerly on the warehouse and land of me, the said Nathaniel Saltonstall, measuring in depth from front to rear forty eight feet, be said measures little more or less, or however otherwise bounded, together with the buildings on said land, with all privileges and appurtenances thereunto belonging." It appears by the documentary evidence in the case, that there was a building, and the land under it, embraced in the above conveyance; and the question is, whether the flats situated in front of this building and land, below high water mark, passed by this conveyance. The case finds, that the demanded premises were originally flats appurtenant to the possession of William Hudson, which possession of Hudson is styled in the Book of Possessions "one house and yard," the boundaries of which are particularly set out. This possession of Hudson, with the flats appurtenant, came by various conveyances to Nathaniel Saltonstall.

By the colony ordinance of 1641, ~~it~~ is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietor shall not, by this liberty, have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands." Anc. Chart. 148.

By virtue of this ordinance, Nathaniel Saltonstall, at the time of making his deed to Caleb Loring in 1771, owned the flats appurtenant to the messuage then owned by him, but formerly owned by William Hudson, and when he conveyed the messuage with the appurtenances, the flats passed as appurtenant, unless the operation of the deed was restricted, by

the terms of it, so as to confine the grant to the land or messuage, to the exclusion of the flats. It was within the power of Nathaniel Saltonstall, the grantor, to convey the land without the flats, or the flats without the land; he being the lawful owner and proprietor of both, with the right and power to dispose of both or either at his pleasure.

What was in fact conveyed by the deed from Saltonstall, must be determined by a construction of the terms of the deed itself. The terms of the deed, upon which the question arises, are "easterly on the sea or flats." If the deed had said only "easterly on the sea," the expression "on the sea," would undoubtedly have carried the grant to low water mark, and have included the flats. The expression "on the sea," legally and technically imports low water mark. If, on the contrary, the deed had said only "easterly on the flats," that form of expression would have limited the grant to the upper part of the flats, and would have excluded the flats, between high and low water mark, from the grant. But the deed says both "on the sea or flats."

On the part of the demandants, it is maintained, that the true construction is to consider the expression, "on the sea or flats," as meaning to bound on the sea, when it is high water, and on the flats, when it is low water; and that by thus having a shifting boundary, sometimes water and sometimes flats, effect can be given to all the words, and the flats excluded from the grant; so that the flats have come to the demandants from their ancestor, Nathaniel Saltonstall. But that construction is inconsistent with the established legitimate import of the terms "on the sea;" that part of the description of the grant being made to yield to the subsequent expression "or flats," this being most favorable to the grantor.

On the other hand, it is maintained, on the part of the tenants, that the terms "on the sea" carry the grant to low water mark, and include the flats; the other expression, "or flats," being made to correspond with the former part of the description. This exposition is inconsistent with the technical import of the term, "or flats," and is most favorable to the grantee.

Here are two different constructions of this deed, the one excluding the flats from the grant, the other including them, one of which must be adopted; but it would be very difficult, perhaps impracticable, to say which, if there were no settled rule of law applicable to the case. But happily there is a well settled and intelligible rule of law precisely applicable to this case, and by the application of which, the difficulty in the construction of this deed may be completely and satisfactorily overcome. That rule is, that the terms of the deed, being those used by the grantor, shall be taken and construed most strongly against him. The construction of the deed to be adopted, therefore, must be that which is most favorable to the grantee, and most strongly against the grantor.

The question is, does the grant include or exclude the flats? The boundary as expressed in the deed is "easterly on the sea or flats." Construing the deed, so as to give to the word "sea" its technical and legitimate import, will carry the grant to low water mark and include the flats; and this construction is not only permitted, but required by the legal and established rule of construction, as being most favorable to the grantee and most strongly against the grantor. The word "flats" must be presumed to have been used, not in a strictly accurate and technical sense, but in a sense corresponding with that of the word "sea," in connection with which it is used. The grantor cannot be supposed to have intended different things by the expression "sea or flats;" and having fixed the boundary "easterly on the sea," he cannot be supposed to have intended to abandon the bound thereby fixed, by the succeeding words "or flats."

There are several cases which favor the construction here put on the word "flats." In *Storer v. Freeman*, 6 Mass. 435, 441, a boundary line was described as running to a heap of stones by the shore at Elwell's Corner. The word "shore" was considered as of the same import as flats. Parsons, C.J., in giving the opinion of the court, says: "The shore has two sides, high water mark, and low water mark. Elwell's Corner is described as a known monument. If it is at low water mark, it is by the shore, as well as if it was at high

water mark. Now, if it be a fact that this corner was a known monument at low water mark, the plaintiff might be admitted to prove it by oral testimony. Then the boundary line running to Elwell's Corner would cross the flats to low water mark; and the next boundary line running by the flats must run by the same side of the flats on which Elwell's Corner stands; and thus the flats would be included by the boundaries of the land conveyed by the second deed." "And we should presume that the word shore was used, untechnically and without legal accuracy, as importing low water mark." In the case of *Mayhew v. Norton*, 17 Pick. 357, the words of boundary employed in the deed were, "by the harbor of Edgartown." The court understood these words as equivalent to bounding by the sea or salt water, and thus including the flats; such appearing to be the intention of the parties. In the case of *Jackson v. Boston & Worcester Railroad*, 1 Cush. 575, 579, one of the boundaries in the deed was, "at the rear of the westerly end by the flats;" and the court say: "Now, as it appears by the language of the deed that the whole lot was intended to be conveyed, and as it is bounded by the rear of the lot of the westerly end, it does not seem to be a strained construction to hold that the flats passed by the deed."

The demandants offer in evidence, to aid in the construction of the deed of Saltonstall to Loring, two leases of Middlecott Cooke to Caleb Loring, the one dated September 25th, 1758, and the other March 25th, 1765. The tenants denied that these leases were competent evidence for the purpose for which they were offered.

In the opinion of the court, if these leases were admissible and admitted, they would not affect the question as to the construction of the deed of Saltonstall to Loring. By the leases, Cooke demises to Loring the shop standing on the premises contained in the deed, by the one lease for the term of seven years, and by the other for ten years; and by the boundaries given in the leases, it is supposed to be clear, that the flats will not pass; and it is now said, that the fact of the flats not being conveyed in the leases tends to show that it was

Fuller v. Emerson.

not intended to convey them in the deed. But it seems to the court that the fact, that the flats were not included in the leases, can have no tendency whatever to show that they were not included in the deed. The leases were not made by the same person who made the deed; and the lessee, who took the use of the shop merely for a term of years, might not deem the flats of any value at all to him, in connection merely with the use of the shop. But when the lessee came to acquire an absolute title to the shop and land, he might then think it important to acquire a title to the flats; and the description of the granted premises in the deed is different from that in the leases. Though the flats were not included in the leases, they were not severed from the upland, but remained still annexed to the fee; and the flats and upland came together to Nathaniel Saltonstall in fee, and were by him conveyed together in fee to Caleb Loring, so that the demandants have no title to the demanded premises derived from their ancestor, Nathaniel Saltonstall.

Judgment for the tenants.

ROBERT FULLER vs. CHARLES EMERSON

A mortgagor of personal property gave one of his creditors an order addressed to the mortgagee, directing him to hold the property for the benefit of such creditor till paid, and to sell the same within six months, and apply the proceeds to the payment of such creditor's debt, after deducting the amount due the mortgagee, and this order was accepted by the mortgagee. Before the six months expired, or any sale was made, the mortgagor took the benefit of the insolvent law, the mortgagee was appointed assignee, and all the property of the mortgagor was assigned to him; and he, as such assignee, sold the property in question. It was held, that the order transferred no interest in the property to the creditor to whom it was given, but was merely an authority to the mortgagee to sell, which was revoked by the assignment in insolvency; and that the creditor could not maintain assumpsit against the mortgagee.

THIS was an action of assumpsit, and was submitted to the court upon the following statement of facts:

On the 22d of June, 1848, Henry G. Knights and William B. Jones, partners in trade under the firm of Knights & Jones, executed and delivered to the defendant a mortgage of certain personal property to secure the payment of certain notes, amounting to \$2000, given by them to him, partly in consideration of their being indebted to him, and partly as security for such liabilities as he had incurred for them, or might incur by a renewal or change of such liabilities. The mortgage contained a stipulation that the mortgagors might keep possession of the property until a breach of the condition, and was duly recorded. The defendant renewed a portion of such liabilities, after the making of the mortgage and before the 15th of August, 1848; at which last named date, as well as at the time of the commencement of the proceedings in insolvency, hereinafter mentioned, the amount in which the mortgagors were indebted to him, and of his liabilities so incurred on their behalf, was \$1500; but the notes secured by the mortgage had not been taken up by the mortgagors, nor had any sum been indorsed upon them.

On the said 15th of August, Knights & Jones were indebted to the plaintiff in the sum of one thousand dollars and upwards, whereof \$491.72 was due and unpaid at the date of the writ, and at the time of the demand hereinafter stated; and on that day the plaintiff applied to them to pay or secure his debt, whereupon they gave him a writing in the following words: "Boston, August 15th, 1848. Mr. Charles Emerson. Sir, we are owing Mr. Robert Fuller one thousand dollars, and wish you to hold the security you now have on any property for his benefit till paid, and to sell the same within six months, and apply the sales of same to the payment of his debt, after deducting the amount due you, say thirteen hundred dollars. Knights & Jones." This order was presented on the same day to the defendant, who wrote upon its face the words "Accepted, Charles Emerson," and delivered it to the plaintiff.

In October, 1848, Knights and Jones dissolved partnership, Knights taking the property and assuming the debts. On the 20th of November, 1848, Knights, as an individual, and as co-

partner with Jones, applied for the benefit of the insolvent laws, and at the first meeting of his creditors, on the 15th of December, 1848, the defendant was chosen assignee, and an assignment made to him by the commissioner of insolvency of the estate of Knights. The mortgaged property remained in the possession of Knights & Jones, until the dissolution of their partnership, and then in the possession of Knights, until the defendant's appointment as assignee.

On the first of February, 1849, the defendant sold, under the order of the commissioner, all the property of Knights, including the mortgaged property, and realized for the latter the sum of two thousand dollars, fifteen hundred dollars of which he applied to the discharge of the debt due him from Knights & Jones, and of the liabilities incurred by him on their behalf, prior to the 15th of August, 1848; and holds the balance in his hands subject to the claim of the plaintiff thereon as against him, individually, or as assignee of Knights, if any such claim exists. After the sale, and before bringing this suit, the plaintiff demanded of the defendant payment of said sum of \$491.72, out of the balance then in his hands; but he refused to pay said sum or any part thereof. Knights obtained a discharge from his debts under the proceedings in insolvency; and a large amount of claims were proved by creditors of Knights, and of Knights & Jones, which the assets of Knights's estate are insufficient to pay.

If, upon the above facts, the plaintiff is entitled to recover, judgment is to be rendered in his favor for the amount of \$491.72, with interest from the date of the writ; otherwise, judgment is to be rendered for the defendant.

W. G. Russell, for the plaintiff. 1. The acceptance of the order by the defendant was for sufficient consideration, and constitutes an express promise by the defendant to the plaintiff to sell the mortgaged property and apply the proceeds to the plaintiff's debt, according to the terms of the order. *Arnold v. Lyman*, 17 Mass. 400; *Adams v. Robinson*, 1 Pick. 461; *Curtis v. Norris*, 8 Pick. 280; *Bourne v. Cabot*, 3 Met. 305. 2. The order and acceptance constituted a valid assignment of the interest of Knights & Jones in the mortgaged property,

and of its proceeds, after payment of the defendant's claim. *Lett v. Morris*, 4 Simons, 607; *Langton v. Horton*, 1 Hare, 549; *Burn v. Carvalho*, 4 My. & Cr. 690; *Gibson v. Cooke*, 20 Pick. 15, 17; *Harris v. D'Wolf*, 4 Pet. 147; *Curtis v. Norris*, 8 Pick. 280; *Drown v. Pawtucket Bank*, 15 Pick. 88; *Dunn v. Snell*, 15 Mass. 481, 485; *Bourne v. Cabot*, 3 Met. 305. 3. The order and acceptance created an equitable lien on the mortgage and mortgage notes in favor of the plaintiff, and a trust, which attached to the proceeds of the mortgaged property, in the hands of the defendant. *Ex parte Carstairs*, 1 Rose, 130; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Eastman v. Foster*, 8 Met. 19. 4. The assignment of Knights & Jones's estate in insolvency does not divest the lien, or annul the trust, or affect the liability of the defendant upon his acceptance. *Burn v. Carvalho*, 4 My. & Cr. 690; *Butler v. Breck*, 7 Met. 164; *Mitford v. Mitford*, 9 Ves. 87, 100; *Langton v. Horton*, 1 Hare, 549; 2 Story on Eq. §§ 1229, 1411; *Mitchell v. Winslow*, 2 Story R. 630; *Eastman v. Foster*, 8 Met. 19, 24; *Leland v. The Medora*, 2 Woodb. & M. 92, 116.

H. C. Hutchins, for the defendant, cited *Malcolm v. Scott*, 3 Hare, 39; *Hoyt v. Story*, 3 Barb. 262; *Carrique v. Sidebottom*, 3 Met. 297; *Hall v. Jackson*, 20 Pick. 194.

SHAW, C. J. This order was not a conveyance or transfer of the mortgaged property to Fuller; it was merely an authority to the mortgagee to sell within six months, and pay to Fuller the surplus remaining after the satisfaction of the mortgagee's own debt. The mortgagee, not being in possession, had no interest in the property beyond that created by the mortgage, and subject to its terms and conditions; and after the discharge of the liability so created, he could have none in that specific property, which would enable him to satisfy the order by a sale. The order was provisional; to pay when the goods were sold; and, until such sale, it only gave an authority to make it, and passed no interest in anything. Before it was exercised, the mortgagors became insolvent; it was revoked by the assignment, and Emerson then took in another character, namely, as assignee, for the benefit of all the creditors. The order could not operate as a pledge or

mortgage, because it was not put on record, nor followed by any transmutation of possession. There was only a naked authority to sell.

It is urged that the acceptance created a personal obligation to pay money which may be recovered in this form of action; but that obligation was conditional, and the condition never occurred. Although Emerson had a right to sell at any time, he was not bound to do so; and even if we were to hold that he undertook to do so at some time within six months, his power was taken away by the proceedings in insolvency, and there could be no "sales," out of which alone he was bound to pay.

Some reliance was placed upon the fact, that the mortgage was given to secure liabilities arising from the renewal or change of those formerly existing. But the acceptance of this order did not secure such liabilities. And supposing the order was given to secure future liabilities in general, Emerson assumed no responsibility for Knights & Jones, by his acceptance. It was a conditional undertaking, and not within the mortgage. The condition not having arisen, there is no obligation upon him nor upon the surplus in his hands, which he must therefore hold for his general creditors.

Judgment for the defendant.

JAMES S. BALDWIN & another vs. JAMES STANDISH.

An executor's bond, approved by the judge of probate, in which the sureties are each bound in half the sum in which the principal is bound, is not for that cause void, but is binding on the obligors, and sufficient to give effect to the executor's appointment, and to render his acts as such valid; but it seems that this court, on an appeal from the decree of the judge of probate, approving a bond in that form, would not countenance such a departure from the usual course of proceeding.

Dewey, J. This is a bill in equity, praying this court to compel the defendant to a specific performance of an agreement for the purchase of a certain parcel of land sold by

auction by the plaintiffs, as executors of Isaac M'Lellan, under authority of the judge of probate, ordering a sale for the payment of debts. The bill sets forth in detail the probate of the will, the appointment of the plaintiffs as executors, and the manner of their giving bond as such. The defendant demurs to the bill, and the only objection relied upon to sustain the demurrer is a supposed defect in the authority of the executors, arising from their not having executed a proper bond to the judge of probate. The form of the bond given was, that the executors were bound in the penal sum of \$60,000, with two sureties, each of whom was bound in the penal sum of \$30,000; and it is insisted, that the form of the bond was irregular, so much so as to render nugatory all the acts of the executors, and in truth that they had no legal capacity to act as executors. The Rev. Sts. c. 63, § 2, provide that "every executor, before entering upon the execution of his trust, shall give bond with sufficient surety or sureties, in such sum as the judge of probate shall order." Does this provision require that the sureties should be, each and all of them, bound in the same sum as the principals? If this question had arisen upon an appeal from a decree of the judge of probate, allowing and approving an executor's bond in such form, we should be strongly inclined to the opinion, that it was a departure from the usual course of proceeding, which ought not to be introduced. There would be great practical difficulties in conducting a suit upon such a bond against principal and surety jointly, where the principal is bound in one penal sum and the surety in a different sum; and as no necessity can ordinarily exist for making a distinction of this kind, and taking a bond with many sureties, whose aggregate liability is the same as that of the principal, we think it should be avoided.

But while we hold this opinion, we are also satisfied that this bond is not to be considered a nullity. It is a bond given in the sum required by the judge of probate, and the bond, after being executed in the form in which it now is, was formally examined and approved by the judge of probate, and ordered to be recorded in the probate office. The executors thereupon received

 Pratt & others v. Rice.

their formal letters, under the hand of the judge of probate, as executors, and have acted as such under them. The bond in this form is not void, and would be binding on the obligors; and being accepted and approved by the judge of probate, it was sufficient to give effect to his appointment of the plaintiffs as executors, and to render their acts valid. They might therefore, as such executors, be authorized to make sale of real estate of their testator to pay debts due from him, and a sale thus made by them is not the less a valid sale, by reason of the bond having been given in the form above stated, in the penal sum of \$60,000 for the principal, and \$30,000 each for the two sureties. The sale was therefore a good one, and the plaintiffs are competent to convey the land thus sold under the authority of the judge of probate.

The result is, therefore, that the defendant is bound to perform the contract of purchase, and to receive the deed of the lands from the plaintiff, and to pay for the same.

Demurrer overruled.

G. W. Phillips, for the plaintiffs.

E. Dexter, for the defendant.



JEFFERSON PRATT & others vs. HENRY RICE. GEORGE F.
HARRINGTON vs. THE SAME.

A testator having, by his will, authorized his executors to sell real estate, and appointed three persons his executors, afterwards, by a codicil, revoked the appointment of one of them by name, and appointed another person in his place and stead; it was held, that the power, to sell devolved upon the two executors appointed by the will, whose appointment was not revoked, and the third appointed by the codicil.

A devise of an undivided part of a testator's real estate must yield to a subsequent clause in the will, authorizing the executors, at their discretion, to sell and convey a part or the whole of the real estate of the testator.

JOSEPH VALENTINE, by his will, after providing for the payment of all his just debts and charges, devised and bequeathed all the estate, real, personal and mixed, which he might leave

at his decease, to his children and grandchildren, in various proportions, the share of one child to be under the control and direction of his executors thereafter named. The will also contained the following clause: "And I hereby authorize and empower my said executors to sell at private or public sale such portions or all of my estate real or personal, as they shall judge expedient, and to make and deliver good and sufficient deeds, or other instruments, for the conveyance thereof." By the last clause of his will, the testator appointed his son in law, Jefferson Pratt, and his sons, Charles Henry Valentine and Edward Hopkins Valentine, and the survivors or survivor of them, executors and executor of his will. He afterwards added a codicil, by which, after reciting that he had appointed his son, Edward H. Valentine, one of the executors of his will, he revoked that appointment, and constituted and appointed his son John Lowell Valentine, an executor, "in the place and stead of the said Edward H. Valentine."

The plaintiffs, Jefferson Pratt, Charles H. Valentine and John L. Valentine, acting as executors of Joseph Valentine, sold certain lands of their testator to the defendant, for purposes of general distribution, and with the parol consent of the heirs. The defendant had taken possession, under his deed, of the estate conveyed to him, and his title had not been disturbed or questioned by any of the heirs.

These actions were brought on promissory notes given by the defendant to the plaintiffs in the first action, who had indorsed one of the notes to the plaintiff in the second action. At the trial, in the court of common pleas, before *Wells*, C. J., the defendant contended, upon the above stated evidence, that the executors had no authority, under the will and codicil of Joseph Valentine, to sell and convey the testator's real estate, and consequently that the notes were without consideration, and void. But the presiding judge ruled otherwise, and the plaintiffs having obtained verdicts, the defendant excepted.

J. C. Adams, for the defendant, cited 1 Sugd. on Powers, (6th ed.) 128, 133, 139, 142 to 144; 4 Cruise, 133; 4 Kent, 320, 321; *Shelton v. Homer*, 5 Met. 462; *Fay v. Fay*, 1 Cush. 93; *Taylor v. Benham*, 5 How. 233; *Bergen v. Bennett*, 1 Caines

Case 1, 15; Townsend v. Wilson, 1 B. & Ald. 608; Bradford v. Belfield, 2 Simons, 264, 271; Ventress v. Smith, 10 Pet. 161, 175; Hall v. Irwin, 2 Gilman, 176; Richardson v. Morey, 18 Pick. 181, 187.

S. F. Plimpton, for the plaintiffs.

DEWEY, J. Supposing the question of the invalidity of the conveyance fully open to the defendant, in an action upon the note given for a part of the purchase money, the inquiry then is, whether the grantors in the deed had authority to execute the same, and whether their deed was effectual to pass the estate to the grantee. This depends upon the construction of the will of Joseph Valentine, and the nature and extent of the power vested in his executors to sell the estate of their testator. It is said, that the power to sell is a naked power, in distinction from a power coupled with an interest. Even if this be so, it does not, under the view which we have taken of the case, affect the validity of this conveyance. This deed was executed by Jefferson Pratt and Charles H. Valentine, two of the persons named in the original will, together with John L. Valentine, who was, in the codicil to the will, appointed as a substitute for Edward H. Valentine, who had been appointed to this duty by the testator, in the original will.

The point taken by the defendant is, that the power to sell was given in the will to three persons *nominatim*, and that only the three therein named could execute it; taking the distinction between a power given to executors generally, to sell the estate of the testator, and a power given to three persons by name, the same persons being also executors. Assuming the present power to have been of the character supposed by the argument of the defendant, the further inquiry then is, who are the three individuals named, as the persons clothed with an authority to sell the real estate of the testator. The defendant insists, that it was the three persons named in the original will. This was so while the will remained unmodified; but by the codicil the appointment of Edward H. Valentine was revoked, and John L. Valentine was appointed "in the place and stead of Edward H. Valentine." The effect of

the codicil was to republish the will, modified and changed by the codicil, and thereafter to be taken and construed as a will of the date of the codicil. It was to all intents and purposes a will of that date, and constituted his three executors by name, embracing the substitute and striking out the name of Edward H. Valentine, as the persons to execute the power of sale. It is to be read as though these three names were originally inserted in the will. That such is the effect of a codicil, is unquestionable. *Kip v. Van Cortland*, 7 Hill, 346. This being so, and the conveyance having been executed by these three persons, the power was well executed as to the persons executing it.

2. The remaining question is, whether the power given to the executors to sell the estate is void, as being repugnant to the devises in fee of the same to various persons. We apprehend that the objection is unfounded. The entire will is to be read, in deciding upon the effect of a particular devise. If any preference is to be made in reference to the order in which the clause is inserted in the will, the last is rather entitled to it than the first. But the will is to be taken as a whole, and the later provisions therein are to be taken as modifying those preceding, whenever such appears to have been the intention of the testator. Hence a devise to A. B. of an undivided seventh part of all the estate of the testator must yield to a subsequent provision in the will, authorizing the executors named in the will, at their discretion, to sell a part or all of the lands of the testator for payment of debts, or for the purpose of converting the same into personal estate, for the more convenient settlement of the estate. *Lancaster v. Thornton*, 2 Bur. 1027; *Bragg v. Ryland*, 7 Mees. & Welsb. 59, 62; *Braman v. Stiles*, 2 Pick. 460, 464; *Conklin v. Egerton*, 21 Wend. 430. The case made by the parties does not state the formal parts of the deed of the executors, or the date. The court are of opinion, that the three persons named as grantors in the deed, were duly authorized by the testator to make the sale, and to execute a good and sufficient deed of the land, and that if the deed is proper in its form, and made in pursuance of the will, it will pass the estate.

Morrison v. Clark. ♦

It has become unnecessary to express an opinion upon various other grounds, relied upon by the plaintiffs, one of which was, that the executors, being also devisees of the land, the deed would be effectual, at least to pass that interest, and this would be a sufficient answer to the defence; and another was, that the defendant yet holding the possession of the land under the deed, and this title not having been disturbed or questioned by the devisees or heirs at law, it was not competent to the defendant to urge this in defence, to an action upon the notes given for the purchase money, for the purpose of showing the want of consideration for the same. For the reasons already stated, upon the other points, this defence must fail, and the plaintiff is entitled to judgment.

Exceptions overruled.

SAMUEL J. MORRISON vs. WILLIAM CLARK.

In an action to recover the price of goods sold, brought more than thirty and less than sixty days after the sale, the plaintiff admitting that the sale was on a credit of thirty or sixty days, the burden of proof is on the plaintiff to show, that the credit was for thirty, and not for sixty days.

THIS was an action of assumpsit on a promissory note for \$47.34, dated October 17th, 1848, and on an account annexed for a quantity of butter sold, amounting to the same sum.

At the trial in the court of common pleas, before Wells, C. J., it was in evidence for the plaintiff, that he sold the defendant butter, as stated in the account annexed, at the price therein mentioned, and it was admitted that the sale was made on a credit of either thirty or sixty days. If the former, the credit had expired when the action was brought; if the latter, it had not. The note was originally payable on sixty days, and was afterwards altered to thirty days; but it being in evidence, that both the original note, and the alteration, were made by clerks, without authority from their principals, and

that no fraud was intended, the presiding judge ruled, that the right to recover depended on the original contract; and to this ruling no exception was taken. The presiding judge also instructed the jury, that it being admitted that the butter was sold on a credit of either thirty or sixty days, the burden of proof was on the plaintiff to show, that the credit was of thirty and not of sixty days. A verdict being rendered for the defendant, the plaintiff excepted.

W. Rogers, for the plaintiff.

F. W. Sawyer, for the defendant, was stopped by the court.

BIGELOW, J. This case presents a simple question as to the burden of proof. Ordinarily, in an action of *indebitatus assumpsit* for goods sold, proof of the sale and delivery of the articles to the defendant, makes out a *prima facie* case, and entitles the plaintiff to recover, unless evidence is offered by the defendant to control it. But in the case at bar, the plaintiff coupled the proof of the sale and delivery, with an admission that it was a sale on credit. Having made this admission, he could not recover until he had shown that the term of credit had expired. This was in the nature of a condition precedent to his right to maintain his action, and, upon the most familiar principles of evidence, the burden was on him to prove its fulfilment. 2 Stark. Ev. (5th Amer. ed.) 871, and notes.

In this case, the admission of the plaintiff was that the sale was on thirty or sixty days. If the former was the term of credit, it had expired before suit brought; if the latter, it had not. This being left doubtful on the plaintiff's admission, it is entirely clear that he has failed to make out a *prima facie* case, because he has left uncertain a fact upon which his right to maintain any action depended. Until this was proved, the defendant had no case to meet. A different rule would compel a defendant to disprove a case before one had been made out against him. The ruling of the court below was therefore correct.

We are inclined to the opinion, that the same result would follow, if no admission had been made by the plaintiff, as to a sale on credit. He claimed to recover for a debt due and

Mussey v. Scott.

payable at the time he commenced his suit. This is the averment which he makes, and is bound to prove. Because he proves the sale and delivery of the articles, and thereby makes out a *prima facie* case, it does not follow that the burden of proof is shifted. All the defendant is bound to do is, to encounter the evidence offered by the plaintiff; and if he offers sufficient proof to throw a reasonable doubt on the case made by the plaintiff, the latter fails to support his action. In such cases, the evidence on both sides relates to the same issue or proposition of fact, and the plaintiff, whose case requires proof of this fact, has throughout the burden of proof. So, on the other hand, if the defendant, instead of offering evidence to disprove the affirmative facts on which the plaintiff relies, sets up new and substantive matter in discharge or avoidance of the action, such as release, accord and satisfaction, payment and the like, then, by the same rule, the burden of proof is on him to maintain it in all stages of the case. But so long as the evidence is confined to an averment, which the plaintiff is bound to make out, the burden of proof remains on him. In this case, therefore, it being the duty of the plaintiff to prove that the debt was due and payable at the time of the commencement of the action, the burden was on him to show this fact, and it did not shift merely because the plaintiff offered evidence, which *prima facie* proved it. *Powers v. Russell*, 13 Pick. 69, 76; *Sperry v. Wilcox*, 1 Met. 270; *Broomfield v. Smith*, 1 Mees. & Welsb. 542.

Exceptions overruled.

BENJAMIN B. MUSSEY vs. SETH B. SCOTT.

A deed, purporting to be the deed of A, and executed "B for A," is well executed as the deed of A, if B was duly authorized to execute it.

THIS was an action of covenant for rent reserved on a lease for years, dated the 7th of July, 1847, and expressed in the

Mussey v. Scott.

following terms: "I, Benjamin B. Mussey, of Boston," &c., "do hereby lease, demise and let unto Seth B. Scott, of said Boston, a certain brick dwelling house," &c., "to hold for the term of one year, from the said seventh day of July, yielding and paying therefor the rent of four hundred dollars per annum; and the said lessee doth promise to pay the said rent," &c.; and was thus executed: "Seth B. Scott," [Seal.] "John Hammond for B. B. Mussey." [Seal.]

At the trial in the court of common pleas, before *Wells*, C. J., the defendant contended, that the suit was not rightly brought in the name of Mussey, but should have been brought in the name of Hammond. The presiding judge ruled otherwise; and a verdict being returned for the plaintiff, the defendant excepted.

F. W. Sawyer, for the defendant, cited *Elwell v. Shaw*, 16 Mass. 42; *Fowler v. Shearer*, 7 Mass. 14; *Stinchfield v. Little*, 1 Greenl. 231, 234; *Brinley v. Mann*, 2 Cush. 337.

A. H. Fiske, for the plaintiff.

METCALF, J. The defendant does not deny Hammond's authority, but takes the ground that the lease is not the deed of Mussey, but of Hammond. And the common learning is relied on, to wit, that when a deed is executed by attorney, it must be the act of the principal, done and executed in the principal's name.

The only question is, what is an execution of a deed, by an attorney, in the name of the principal? We understand the execution of a deed to be the signing, sealing and delivery of it. These must be done in the name of the principal, by the hand of the attorney. When the signing and sealing are in the name of the principal, the delivery will be presumed to have been so, unless the contrary is proved. But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney, or of no one. *Lessee of Clarke v. Courtney*, 5 Pet. 350.

The most usual and approved form of executing a deed by attorney is by his writing the name of the principal, and adding, "by A B, his attorney," or "by his attorney, A B."

Sheldon v. Kendall.

But this is not the only form of execution which will make the deed the act of the principal. In *Wilks v. Back*, 2 East, 142, M. Wilks, attorney of J. Browne, executed a deed for himself and Browne, in this form: "Mathias Wilks." [Seal.] For James Browne, Mathias Wilks." [Seal.] The court of king's bench decided that the deed was well executed in the name of Browne. This decision has never been overruled, but has always been regarded as rightly made. Sugden on Powers, (1st Amer. ed.) 205; Paley on Agency, (3d Amer. ed.) 182; 3 Amer. Jurist, 82 & seq.; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Monr. 612. We are therefore of opinion that the ruling at the trial was correct.

Exceptions overruled.

GEORGE R. SHELDON vs. WILLIAM B. KENDALL.

In an action of debt on the judgment of a court of another state, the defendant, under the Rev. Sta. c. 96, § 11, may prove that the action is brought for the use of another person than the plaintiff, and may set off any demand which he may have against such person, which could not have been pleaded in defence of the action in which the judgment was recovered.

THIS was an action of debt on a judgment obtained in New York; and was tried in the court of common pleas, before *Wells*, C. J.

The defendant pleaded the general issue, and specified in defence, that the original action, in which the judgment was rendered, was brought in the name of the plaintiff, on a draft accepted by the defendant, without consideration, and for the accommodation of Edmund Kimball, Jr., & Company, and that the judgment was rendered without any appearance by the defendant; that the draft was never the property of the plaintiff, but that the suit was brought thereon, he knowing all the facts, in his name, for the benefit of Kimball & Company; that the draft, though accepted by the defendant

Sheldon v. Kendall.

for the accommodation of Kimball & Company, was in fact paid by him at maturity, by his accepting and afterwards paying another draft of Kimball & Company, substituted therefor, the first draft not having been taken up and cancelled as it ought to have been; and that Kimball & Company were indebted to the defendant for the amount of the substituted draft and interest, for a balance of account rendered, and also for the amount of a judgment recovered by the defendant against Kimball & Company; and the defendant claimed a right to set off these several sums, which exceeded in the whole the amount of the judgment on which this action was brought. The defendant offered evidence to prove the facts set forth in his specification; but the same being objected to, it was rejected by the presiding judge; and a verdict being thereupon rendered for the plaintiff, the defendant excepted.

G. M. Browne, for the defendant.

E. F. Hodges, for the plaintiff.

BIGELOW, J. The question in this case arises upon the construction of Rev. Sts. c. 96, § 11, in relation to demands in set-off. It was manifestly the intention of the legislature, in several of the provisions contained in this chapter, to enlarge the limits which had formerly been prescribed to the right of set-off. The statute was originally founded on considerations of equity. The course of judicial decisions, which tended to give larger protection to the rights of parties, seeking to enforce equitable demands, rendered it highly just and expedient to extend the privilege of set-off to similar claims. This being the plain intent of the legislature, it is the duty of the court so to construe the statute as to give full efficacy to its provisions. The language used in the section of the statute under consideration is broad and general, and free from all ambiguity, and we can see no good reason for giving it a narrow and limited construction. Such, certainly, would be the effect of confining the right of set-off, as contended by the plaintiff, to cases where it appeared by the record, that the suit was brought in trust for the use and benefit of a person other than the nominal plaintiff. We think the true meaning of the statute is, to allow defendants the right to set-off claims,

properly the subject of set-off, against those persons who are the equitable owners of the demand in suit, without regard to the nominal parties to the record. In all cases, where it can be proved by the defendant, that the action is brought in the name of one person, for the purpose of enabling another, not a party to the record, to realize the benefit and fruits of a judgment, the right of set-off, as against the beneficial owner of the demand in suit, is given to the defendant. This construction of the statute is strengthened by reference to § 5, of the same chapter, in which the right is given to a defendant to set-off any demand, of which he is the equitable owner, if assigned to him before suit brought, although not originally payable to himself. Taking the two sections together, it is very clear, that claims of an equitable character are put on precisely the same footing as to set-off, whether in the hands of plaintiff or defendant, and without regard to the nominal parties to the record. Indeed, it has been already decided, that in a set-off even in an action at law, the court will recognize equitable demands, upon which an action would not lie in the name of the party beneficially interested, and that the right is not confined to legal demands between the parties to the action. *Commonwealth v. Phoenix Bank*, 11 Met. 129, 136.

In cases like the one now before the court, the burden of proof is on the defendant, to prove that the party, against whom the set-off is claimed, is the real party in interest; but when that is satisfactorily made out, the right of set-off as against the party in interest is the same as if he were the party to the record. We are therefore of opinion, that the court below erred in rejecting the evidence offered by the defendant, and that he should have been permitted to show, that the suit was brought for the use and benefit of the persons against whom he claimed and had filed his set-off.

It is hardly necessary to add, that nothing can be shown by way of set-off to the judgment on which the plaintiff relies, which involves the merits of the original debt, or which could properly have been pleaded and proved in defence or answer to the claim on which such judgment is founded. It is too well settled to be now drawn in question, that a judgment re-

Adams v. Brown.

covered in the courts of another state, having jurisdiction of the parties and subject matter, is conclusive in the courts of this state as to all matters of defence which were open to the party defendant in the original suit. *Homer v. Fish*, 1 Pick. 435; *Hall v. Williams*, 6 Pick. 232; *Gleason v. Dodd*, 4 Met. 333. The defendant in this case must therefore be confined strictly to demands properly the subject of set-off, entirely independent of the merits of the claim on which the judgment is founded, and which could not have been pleaded in set-off in the original suit.

Exceptions sustained.

ASA ADAMS vs. CHARLES BROWN.

A master in chancery, to whom a bill in equity, brought to redeem a mortgage on a house and land, was referred, to state an account of the amount due on the mortgage, disallowed certain charges made by the mortgagee, for expenses incurred by him in repairs undertaken with a view to remedy a defect in the original structure, which repairs, by reason of the employment of unskilful persons, and the use of unsuitable materials, failed of their object. It was held, that the question was one peculiarly within the province of the master to decide; that every reasonable presumption was to be made in favor of his decision; and that unless it clearly appeared by his report or otherwise, that he had acted under a mistake, his report was to be sustained.

There is no fixed rule of law limiting the compensation to which a mortgagee in possession of real estate may be entitled for his services in the care and management of the mortgaged premises. Therefore, where a master in chancery, to whom it was referred to state an account between mortgagor and mortgagee, allowed the latter a commission on the rent received by him of five per cent. only, for his services in the care and management of the estate, and at the same time reported that he was satisfied that such commission would not compensate the mortgagee for his trouble, but that he did not feel at liberty to allow more, not knowing that the court had ever allowed a greater rate of commission; the report was recommitted to the master, with directions to allow the mortgagee such further sum, as he might think just and reasonable.

Where a mortgagee enters for a breach of condition by non-payment of interest, and the mortgagor brings a bill in equity to redeem, pending which the principal becomes due, the mortgagor is not entitled to a decree, but upon paying the whole sum now due, principal and interest.

THE facts of this case, so far as they are necessary to the understanding of the points of law decided, sufficiently ap-

pear in the opinion of the court. Written arguments were presented by *G. W. Phillips*, for the defendant, and *J. B. Robb* for the plaintiff.

BIGELOW, J. This is a bill in equity brought by the owner of the right in equity to redeem a certain piece of real estate, situated on Washington Street, in Boston, against the assignee of a mortgage thereon.

The mortgage was made to secure the payment of a note for six thousand dollars, dated the 1st of February, 1845, payable in five years from date, with interest semi-annually. The interest, which became due on the 1st of August, 1845, not having been paid, the defendant, on the 13th of January, 1846, entered for breach of condition, and for the purpose of foreclosure. The bill was filed on the 12th of January, 1849.

The case was sent by agreement of the parties to a master in chancery, to state the defendant's account, who, having attended to that duty, made report thereof to the court. After the coming in of the report, and after the defendant had filed certain exceptions thereto, which will be noticed hereafter, he also filed, by leave of court, a supplemental answer, in which he sets forth that since the proceedings aforesaid, the principal sum secured by the mortgage had become due and payable, together with interest thereon, and that certain further sums had been expended by him in the care and repairs of said real estate, and praying that said sums, and such further sums as may be expended by him on the estate, may be included in the decree, which the court may render in the case, for the redemption of the estate by the plaintiff, in addition to those embraced in the master's report.

Two exceptions have been taken by the defendant to the report of the master, and submitted to the consideration of the court.

The first is, that the master disallowed certain items, amounting to one hundred and seventy two dollars and fifty two cents, which were claimed by the defendant, as having been expended by him for repairs and improvements on the estate. In regard to these sums, it appears by the master's report, that the house was originally so built, that, in certain

seasons, the tide water flowed into the cellar, and that the defendant, after he took possession, expended the above sum in several different attempts to remedy this difficulty, but that owing to the employment of unskilful persons and the use of unsuitable materials, he failed entirely in accomplishing the object. No improvement or benefit to the estate was effected by these expenditures, and as they were all incurred in attempts to remedy a defect in the original construction of the house, it may be questionable whether they can be properly considered as repairs. If not, then they do not come within the provisions of Rev. Sts. c. 107, § 15, and ought not to be allowed to the defendant. However this may be, the rule is well settled in cases of this nature, that all such questions are peculiarly fit for the consideration of a master, and every reasonable presumption is to be made in favor of his decision; and unless it clearly appears from the report or otherwise, that he has acted under mistake, his report will be sustained. *Reed v. Reed*, 10 Pick. 398, 400. Upon a careful review of the evidence reported by the master, the court see no reason for revising his decision on this point, and the exception thereto must be overruled.

The second exception to the report of the master is, that the defendant was allowed only five per cent. commissions on the rent received by him, as a compensation for his services in the care and management of the estate. Upon this point the master reports "that he was satisfied that five per cent. on the rents would not compensate the defendant for his trouble, but that he did not feel at liberty to allow more, not knowing that the court had ever allowed a greater rate of commission." We are not aware that any fixed rule has ever been laid down by this court, limiting the compensation to which a mortgagee in possession of real estate may be entitled for his services in the care and management of the mortgaged premises, and from the nature of the case, any such rule would be impracticable. In many cases, a commission of five per cent. on the rents received would be wholly inadequate, while in other cases, it might be a very liberal compensation. Each case in this respect must depend on its own peculiar circumstances.

Cazenove v. Cutler, 4 Met. 246. As the master has found the services of the defendant in this case to have been worth more than he felt at liberty to allow, this exception to the report is sustained, and the case is to be recommitted to the master, with directions to allow the defendant such further sum as he may think just and reasonable. •

The only remaining question in the case arises on the supplemental answer of the defendant, in which he asks that the entire sum due and payable on the mortgage, both principal and interest, may be included in the final decree for the redemption of the estate.

After the condition of a mortgage is broken, and the mortgagee has entered for breach thereof, the legal estate of the mortgagor is determined, and has become vested in the mortgagee. All that the mortgagor has remaining is an equitable estate, that is, a right to redeem the premises, on paying what is due on the mortgage. When, therefore, he comes into a court of equity to regain his legal title and possession, he must pay what is actually due on the mortgage up to the time of redemption, before he can entitle himself to be restored to his legal rights. Otherwise he would receive more than he is willing to give, which would contravene the familiar and elementary principle, that he who seeks equity must do equity. *Mann v. Richardson*, 21 Pick. 355.

The objection made by the plaintiff to a decree for the payment of the entire sum due on the mortgage is founded on a misconstruction of some of the provisions of Rev. Sta. c. 107. The argument is, that because by § 14 the mortgagor is required to tender only the sum due and payable at the time of the tender, so when he brings his bill to redeem under § 18, without a previous tender, he can be required, in order to entitle himself to redeem, only to pay the same amount that he is bound to tender under § 14, that is, the amount due and payable at the time of filing his bill. But this is clearly an error. The purpose of § 14 is to prevent a forfeiture of the estate, and if a tender is made in compliance with its provisions, it enables a party to save his estate by commencing a suit to redeem within a year after the tender.

Quinn v. Fuller.

as provided by § 17. But the purpose of § 18 and of the sections immediately following is entirely different. They prescribe the manner and the terms of redemption by a suit in equity without a previous tender. By § 23 it is enacted, that in such cases "the court shall inquire what sum is due on the mortgage, and shall enter a decree, that, upon payment of *such* sum, within such time as the court shall order, the plaintiff shall have possession of the premises to hold discharged of the mortgage." The statute requires the court to ascertain what sum is due and payable at the time of the decree, not what was due and payable, when the bill was filed; and the sum so ascertained is to be embraced in the decree for redemption. Any other construction would not only be unreasonable, but would contravene the plainest principles of equity on which all these proceedings are founded. Rev. Sts. c. 107, § 29. The reasoning of the court in *Mann v. Richardson*, before cited, fully sustains these views, and we can see no difference in principle between that case and the case at bar. *Stewart v. Clark*, 11 Met. 384; 2 Dan. Ch. Pr. (Perk. ed.) 1206.

The case is therefore to be recommitted to the master to state the defendant's account in conformity with the principles above stated; and upon the coming in of his report, the usual decree for redemption will be ordered.

JOHN QUINN vs. ENOCH P. FULLER.

A firm, who have purchased, for a good consideration and before maturity, a promissory note, given to one of the partners for his accommodation, cannot maintain an action thereon against the maker.

THIS was assumpsit on a promissory note, signed by the defendant, payable to one Carley, and by him indorsed.

At the trial in the court of common pleas, before *Wells*,

Quinn v. Fuller.

C. J., it was in evidence that this note, with others, was signed by Fuller for the accommodation of Carley, to enable him to pay sundry debts, among which was a debt to one Farwell; that Carley indorsed the note in suit to Farwell in payment of his debt; that Farwell sold and transferred it, for a good consideration and before maturity, to the firm of Carley & Clapp, of which said Carley was a member; and that Carley & Clapp indorsed the same to the plaintiff after it became due.

The defendant contended, that the note declared on being an accommodation note, Carley, the accommodation payee, could not become a holder, so as to recover against the accommodation maker, nor could the firm of Carley & Clapp, of which Carley was a member. But the presiding judge instructed the jury, that the note declared on was originally an accommodation note; and that if the transfers from Carley to Farwell and from Farwell to Carley & Clapp were on good consideration, and before maturity, then the plaintiff, deriving a title from Carley & Clapp, could maintain an action on the note against the defendant. Under these instructions the jury returned a verdict for the plaintiff; whereupon the defendant excepted.

S. G. Nash, for the defendant.

There was no appearance for the plaintiff.

DEWEY, J. There would be no doubt, if this action was instituted in the name of Carley, that the defence that it was a mere accommodation note executed by the defendant at the instance of Carley, would be a good defence. The further inquiry is, whether this defence would be equally good, in a suit by Carley and his copartner Clapp, as the note was received by the copartnership before maturity. We are satisfied that such must be the effect. As one of the parties, who must have been a plaintiff, if the action had been brought for the firm, is shown to have no right to recover, his co-plaintiff and partner is affected with notice of the want of consideration, and want of equity as to Carley, and the action wholly fails. *Chit. Bills*, (10th Amer. ed.) 70; *Sparrow v. Chisman*, 9 B. & C. 241. It being agreed that the note was

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

indorsed after it became due, and was in the hands of Carley & Clapp at maturity, the plaintiff is subject to the like defence, as if the action had been instituted in the names of Carley & Clapp. *New trial ordered.*

THE PROPRIETORS OF ST. LUKE'S CHURCH IN CHELSEA
vs. RUGGLES SLACK & others.

Twelve persons, having associated themselves together, according to the forms and usages of the protestant episcopal church, for the purpose of establishing public worship under the name of Mount Zion Church in Chelsea, and having afterwards organized themselves as a religious society under the Rev. Sts. c. 20, §§ 26, 27, 28, 29, and, by means of subscriptions of members, and contributions from other sources, collected funds for the building of a church; subsequently, pursuant to to a vote of the society at a regular meeting called for the purpose, applied to the legislature, by a petition signed by all the members but one, who was absent from the state, for a change of name and an act of incorporation as the proprietors of St. Luke's Church in Chelsea: The legislature passed an act accordingly, changing the name of the society, and incorporating three of the petitioners, with their associates and successors, as a religious society, with all the powers and privileges, and subject to all the duties, restrictions, and liabilities contained in the twentieth and forty fourth chapters of the Rev. Sts., and with power to hold real and personal estate, to be applied exclusively to parochial purposes: Certain members of the society, who had subscribed towards the building of the church, having had separate meetings before the passage of the act, continued to hold them afterwards, and organized themselves separately, under the act, as the proprietors of the church: The members of the society, also, including said subscribers, accepted the act and organized under it as a religious society; and each of the two bodies chose appropriate officers. It was held, that the act did not create a new corporation, composed of the proprietors of the church merely, but changed the name of Mount Zion Church in Chelsea, and incorporated the members thereof as a religious society, under the name of the proprietors of St. Luke's Church in Chelsea.

On the refusal of the treasurer or clerk of a religious society, whose term of office has expired, to deliver the records and papers of the society to his successor in office, a writ of mandamus will be issued, on the petition of the society, to compel him to do so.

THIS was a petition for a writ of mandamus. It was originally presented in the name of the wardens and vestry of St. Luke's Church in Chelsea, but, by leave of court, was amended, and put into the form of a petition by the proprie-

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

tors of St. Luke's Church in Chelsea, by the wardens and vestry. A motion was made by the respondents to dismiss the amended petition, for various reasons set forth in the motion; but this motion was overruled, and the case was heard on its merits.

The petition set out, that on the 31st of August, 1841, a religious society was formed in Chelsea, according to the forms and usages of the protestant episcopal church, and articles of association subscribed for that purpose by ten or more members, who were qualified voters at the time; that on the 7th of September, 1841, the parish was organized according to the statute, under the name of Mount Zion Church in Chelsea; that in 1844, the parish petitioned the legislature for a change of name, and also for an act of incorporation, for the purpose of holding real estate and personal property for parochial purposes exclusively; that the prayer of this petition was granted by an act of the legislature, approved March 4th, 1844, incorporating the petitioners and their associates, by the name of the proprietors of St. Luke's Church in Chelsea,* which was accepted by the parish; that at the annual meeting in 1849, among other officers chosen by the parish or religious society, Ruggles Slack was elected treasurer; that in June, 1849, Slack resigned his office of treasurer; that one Wilder was chosen treasurer in his stead;

* This act (St. 1844, c. 72,) is as follows:

"An act to incorporate the Proprietors of St Luke's Church in Chelsea, and for other purposes.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"SECT. 1. From and after the passing of this act, the name of Mount Zion Church, in Chelsea, shall be changed, and the said church shall be known and called by the name of St. Luke's Church, in Chelsea.

"SECT. 2. William S. Bartlett, Stephen D. Massey, and William Knapp, their associates and successors, are hereby made a corporation, by the name of the Proprietors of St. Luke's Church, in Chelsea; with all the powers and privileges, and subject to all the duties, restrictions, and liabilities set forth in the twentieth and forty fourth chapters of the Revised Statutes.

"SECT. 3. Said corporation may hold real estate to an amount not exceeding eight thousand dollars, and personal estate to an amount not exceeding two thousand dollars; provided the same be applied exclusively to parochial purposes."

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

that a committee, duly appointed for the purpose, waited on Slack, and informed him of the appointment of another treasurer, and demanded of him the books and papers belonging to the parish for the use of the treasurer; and that Slack, after stating that he would deliver up the books and papers, ultimately wholly refused, and still did refuse, to deliver up the books and papers, but held them, contrary to the wishes of the parish. The petition further stated, that Edwin C. Barnes, one of the respondents, was elected clerk of the parish, and received the books and papers belonging to the parish for the use and assistance of their clerk; that Barnes subsequently resigned the office of clerk; that the books and papers were demanded of him; that he stated that he had given them to Edwin C. Bailey, the other respondent, to be by him delivered up to the parish, and that he regretted that Bailey had not delivered them up as he agreed to do; that the books were demanded of Bailey, who stated that he wished to inspect them before giving them up, but would do so in a few days; that the books were subsequently demanded of Bailey, who then peremptorily refused to deliver them up, and still retained them in his possession. The petition further stated, that neither Slack nor Bailey was a member of the parish, their names, at their request, having been taken from the list of members. The petitioners then prayed that a writ of mandamus might be directed to Slack, Barnes, and Bailey, commanding them, upon the receipt of the writ, to deliver up to the petitioners all the books and papers belonging to the parish.

The respondents, Slack, Barnes and Bailey, appeared and showed cause against the issuing of the writ of mandamus. They said; that if the petitioners were the owners of the books sought for, they might obtain possession of them by a writ of replevin; or if the books were secreted, so that they could not be replevied, then the remedy of the petitioners was by a bill in equity; or that if they were owned in common by the petitioners and respondents, or any other persons, then the mode of remedy should be by a bill in equity; that the court could not proceed to a decree for the petitioners, be-

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

cause a corporation called the proprietors of St. Luke's Church in Chelsea, whose right might be affected, had not been summoned and was not before the court; that the subject matter of the controversy was not of a public nature or of public concern; and that the petition did not appear to be supported by the affidavit of the petitioners, or of either of them.

The respondents further stated that if, in the opinion of the court, they were bound to show further cause, they admitted that, in or about the year 1841, a religious society was formed, in Chelsea, according to the usages of the protestant episcopal church; they did not admit the organization, however, as stated by the petitioners, but left the petitioners to their proof: That a petition was presented to the legislature for a change of name; but they did not know or recollect whether it was the act of the parish or of individuals; the respondent, Slack, believing it to be the act of individuals: And that an act of the legislature was passed on or about the 8th of March, 1844, entitled "An act to incorporate the proprietors of St. Luke's Church in Chelsea, and for other purposes." The respondents did not admit, that the parish, as such, ever had any interest in the property of the corporation created by the act; but they claimed, that the title, legal or equitable, was in certain persons who had subscribed for stock or shares in a church edifice, and that it was now in said corporation. The respondents alleged, that under the act of the legislature, on the 8th of April, 1844, there was a distinct and separate organization of the parish formerly called Mount Zion Church, which was, by the first section of the act, allowed to take the name of St. Luke's Church, and also a distinct and separate organization of the proprietors of St. Luke's Church; and that, from that time to the present, the organization of the parish and of the proprietors had been kept separate and distinct each from the other; each body electing from year to year its own officers. The respondents admitted that Slack was elected treasurer of the church, meaning thereby the parish so called, and that he resigned that office.

The respondent Slack admitted that he had been notified

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

of the election of Wilder, as treasurer of the parish, and that he had been requested to deliver to Wilder the books and papers belonging to the parish; alleged that he had no books or papers of the parish other than a memorandum book of moneys received and payments made by him as treasurer, which he was willing to exhibit; submitting, however, whether he was not entitled to hold said book for his protection; and said that he had not collected or claimed to collect any money belonging to the parish, except what he had accounted for. He also said that, at the annual meeting in 1849, he was elected treasurer of the corporation, called the proprietors of St. Luke's Church; that he accepted that office, and now held it, and that in that capacity he had collected, and claimed to collect, various sums, for all which he was ready to account as treasurer of the society.

The respondents further said, that Barnes had placed in the hands of Bailey certain books and papers; and they did not admit that the same belonged to the parish, except as afterwards stated; that, before the books were delivered by Barnes to Bailey, Bailey was duly elected clerk of the proprietors, and had since acted as their clerk; Bailey being at the time, and still claiming to be, one of the vestry of the parish; that Barnes delivered to Bailey a book and certain papers relating, as the respondents believed, in part, to the business of the parish, and in part to the proprietors of St. Luke's Church. This volume Bailey claimed to hold as clerk of the proprietors; had offered to furnish copies of what relates to the parish; and was ready to place the book and papers in the custody of the court, so that the petitioners could have access to the same; and the respondents prayed that the petition might be dismissed, and for their costs.

The substance of the evidence is sufficiently stated in the opinion.

B. Rand and *S. C. Maine*, for the petitioners, cited, to the point that the members of the parish were the persons intended to be incorporated by *St. 1844, c. 72*, and that they, and not the pew-owners, were entitled to the property in question; *Rev. Sts. c. 20, §§ 25, 26, 27, 36, 37, 39, 40; Howard v. First*

Parish in North Bridgewater, 7 Pick. 138; *Fassett v. First Parish in Boylston*, 19 Pick. 361; *People v. Runkel*, 9 Johns. 147; *Green v. Cady*, 9 Wend. 414; *Dutch Church v. Mott*, 7 Paige, 77; 3 Kent Com. 402, 419; *Stocks v. Booth*, 1 T. R. 428; *Tattersall v. Knight*, 1 Phillim. 232, 237; *Fuller v. Lane*, 2 Addams, 419, 426; *Walter v. Gunner*, 1 Hagg. Con. 321; *Partington v. Rector &c. of Barnes*, 2 Lee, 345; *Pettman v. Bridger*, 1 Phillim. 316, 324; *Blake v. Usborne*, 3 Hagg. Eccl. 726, 733; *Pawson v. Scott*, Sayer, 176; *Freligh v. Platt*, 5 Cow. 494; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28; *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608; *In the matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155; *Shaw v. Beveridge*, 3 Hill, 26; *Wentworth v. First Parish in Canton*, 3 Pick. 344; *Gay v. Baker*, 17 Mass. 435; 1 Burn. Eccl. Law, 358 to 364: To the point that the petitioners were entitled to a writ of mandamus; *Tapping on Mandamus*, 19, 22, 24, 25, 27; *Angell & Ames on Corp.* (3d ed.) 654, 655, [(4th ed.) §§ 711, 712]; *Willcock on Corp.* 356; *The King v. Dean Inclosure*, 2 M. & S. 80; *The King v. Bishop of Chester*, 1 T. R. 396, 404; *The King v. Stafford*, 3 T. R. 646, 652; *The Queen v. Victoria Park Co.* 4 P. & Dav. 639, 642; *The King v. Severn & Wye Railway*, 2 B. & Ald. 646; *Clarke v. Bishop of Sarum*, 2 Stra. 1082; *The Queen v. Norwich & Brandon Railway*, 4 Railw. Cas. 112; *The King v. Bank of England*, 2 Doug. 524, 526; *The King v. Nottingham Old Water Works*, 1 Nev. & Per. 480; *Western v. Brooklyn*, 23 Wend. 334; *McCullough v. Brooklyn*, 23 Wend. 458, 461; *First Parish in Sudbury v. Stearns*, 21 Pick. 151; *People v. New York Superior Court*, 10 Wend. 285; *People v. New York*, 10 Wend. 393, 396; *People v. Albany*, 12 Johns. 414; Selw. N. P. (11th ed.) 1077: And to the point that the writ might be directed to a former officer, and any one aiding him in withholding the books; *Angell & Ames on Corp.* (3d ed.) 648, [(4th ed.) § 707]; *Rex v. Wildman*, 2 Stra. 879; *Anon.* 1 Barnard. 402; *The King v. Ingram*, 1 W. Bl. 50; *Rex v. Clapham*, 1 Wils. 305; *Town Clerk of Nottingham's Case*, 1 Sid. 31; *Taylor v. Henry*, 2 Pick. 397; *First Parish in Sudbury v. Stearns*, 21 Pick. 151; *Commonwealth v. Athearn*,

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

3 Mass. 285; *Rex v. Barker*, 3 Bur. 1265; Wilcock on Corp. 395; Bac. Ab. Mandamus, D; *The King v. Owen*, 5 Mod. 314; *Crawford v. Powell*, 2 Bur. 1013; Tapping on Mandamus, 49, 50.

F. O. Watts, for the respondents, to the point that the petitioners were not entitled to the books and papers in question, cited Angell & Ames on Corp. (3d ed.) 64, [(4th ed.) § 76]; *Penobscot Boom Corporation v. Lamson*, 4 Shepl. 224; *Second Congregational Society in North Bridgewater v. Waring*, 24 Pick. 304; *Howard v. Hayward*, 10 Met. 408; St. 1825, c. 43; Rev. Sts. c. 20, §§ 26 – 28, 31 – 36, 37; and to the point that a mandamus should not be granted in this case; *Ex parte Fleming*, 4 Hill, 581; *Woodman v. Somerset*, 11 Shepl. 151; Angell & Ames on Corp. (3d ed.) 631, 654, [(4th ed.) §§ 698, 712]; *Rex v. Barker*, 3 Bur. 1265; *Montague v. Dudman*, 2 Ves. Sen. 396; Story Eq. Pl. (4th ed.) § 553, note (4); *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Ex parte Nelson*, 1 Cow. 417, 423; *People v. Brooklyn*, 1 Wend. 318, 324; 1 Paine & Duer's Prac. 78; *Oakes v. Hill*, 8 Pick. 47; *Carpenter v. Bristol*, 21 Pick. 258; *Commonwealth v. Rosseter*, 2 Binn. 360; *People v. Throop*, 12 Wend. 183; *Ex parte Firemen's Ins. Co.* 6 Hill, 243; *People v. Stevens*, 5 Hill, 616; *Strong, Petitioner*, 20 Pick. 484, 497; *Harrington v. Berkshire*, 22 Pick. 263, 268; *The King v. Margate Pier*, 3 B. & Ald. 221.

FLETCHER, J.* The petitioners maintain that, by the act of the legislature of March 8th, 1844, the name of the parish or religious society, before that time known as Mount Zion Church, was changed to that of St. Luke's Church in Chelsea; and that the members of said parish or religious society were incorporated by the name of the proprietors of St. Luke's Church in Chelsea, with power to hold real and personal estate for parochial purposes only; that thus Mount Zion Church became an incorporated parish, by the name of the proprietors of St. Luke's Church in Chelsea; and that the church and land and property which have been occupied by the parish, rightfully and lawfully belong to the parish in-

* METCALF, J., did not sit in this case.

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

incorporated by the act of the legislature, by the name of St. Luke's Church in Chelsea, and formerly known by the name of Mount Zion Church.

On the other hand, the respondents maintain that, by the act of the legislature, the name of Mount Zion Church was changed to St. Luke's Church in Chelsea; that with this new name the former remained a parish, for parish purposes, wholly under its old organization, and was not otherwise affected by the act; that said act, having thus in the first section disposed of and dismissed under a new name Mount Zion Church, proceeds to create and incorporate, and did create and incorporate, an entirely new and distinct corporation, by the name of the proprietors of St. Luke's Church in Chelsea; that this new corporation is not a parish, nor created for parochial purposes, but for the purpose of holding property; that the church edifice and land and property which have been occupied and used by the parish, belong to and are owned by this new corporation, the parish having no title to the same; and that the parish of St. Luke's Church, and the corporation called the proprietors of St. Luke's Church in Chelsea, are not one and the same, but distinct and independent bodies, organized for different purposes. In support of their respective positions, the petitioners and respondents rely upon various affidavits and documents filed in the case, and referred to and commented on at the hearing.

The controversy turns upon the construction of the act of March 8th, 1844. The question is, did that act incorporate the members of Mount Zion Church merely as a parish or religious society, for parochial purposes, with power to hold property for such purposes merely, or did it create and incorporate an entirely new corporation, not for parochial purposes, but to hold property as a joint stock company? To settle this question, it is necessary to examine and consider the evidence in the case. It appears very clearly and satisfactorily from the evidence in the case that, in August, 1841, certain persons, twelve in number, associated themselves together as members of Mount Zion Church, a religious society in Chelsea, according to the forms and usages of the protestant epis-

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

copal church; that they shortly afterwards organized as a parish or religious society, according to the statute, by the name of Mount Zion Church in Chelsea; that soon after their organization a hall was procured as a place for public worship, in which they had public service, and that in about a year a rector was called and settled; and that, in the spring of 1843, various meetings were held by the worshippers of Mount Zion Church, for the purpose of devising ways and means of raising money to build a church. To aid this object, an appeal to the public was published in a newspaper in Boston, in July, 1843, which appeal was afterwards printed in another form, and circulated in Boston and elsewhere. This appeal was also bound in a subscription book, and a considerable amount was obtained by subscriptions of various persons out of Chelsea. The ladies of the parish, also, raised a considerable sum by fairs and otherwise. The communion offerings and monthly collections of the parish were also directed to this object. A sum from the income of the parish was also appropriated; various individuals in Chelsea contributed; and a considerable sum was raised from various members of the parish. In the spring of 1843, at a meeting of the wardens and vestry, a committee was appointed to wait on the agent of the Winnisimmet Company, with a view to obtain from the company a gift to the parish of a piece of land towards erecting a church or chapel; and a lot of land was ultimately given by the company, which was sold, and the proceeds added to the fund for erecting the church. After the act of incorporation, a deed of the land was made to the proprietors of St. Luke's Church in Chelsea.

In February, 1843, the rector purchased two lots of land in Chelsea, on favorable terms, with a view to offer them to the parish at cost; and in October of that year, he offered the land to the parish on certain conditions, and the offer was accepted. While thus intent upon the object of obtaining for themselves a house in which to worship, at a meeting of Mount Zion Church, duly called for that purpose, it was voted, that a petition be presented to the legislature, at their then present session, praying them for leave to change the

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

name of the same to that of St. Luke's Church, and for an act of incorporation as the proprietors of St. Luke's Church in Chelsea. This vote is for an act of incorporation as the proprietors of St. Luke's Church in Chelsea. In pursuance of this vote, a petition was presented, which states the original organization of Mount Zion Church, and then proceeds: "The said church now propose to erect a suitable edifice in which to worship, and the records of said church being incomplete, by reason of circumstances beyond their control, in order to the better management of their affairs, and to greater security in the same, they pray for a special act of incorporation, and as said church has, since its organization, increased in numbers, a very great majority, if not the whole body, would prefer to be called by the name of St. Luke's Church in Chelsea." This petition was signed by all the male members of the parish but one, who was then out of the country. Upon this petition the act of the legislature was passed; the first section changing the name of Mount Zion Church to St. Luke's Church; and the second section making William S. Bartlett, Stephen D. Massey, and William Knapp, three of the signers of the petition, and their associates and successors, a corporation by the name of the proprietors of St. Luke's Church in Chelsea, with power to hold real estate to an amount not exceeding eight thousand dollars, and personal estate not exceeding two thousand dollars, to be applied exclusively to parochial purposes. The term "associates" in the act doubtless was used to include the other signers of the petition, with those particularly named, rather than to insert the names of all the individuals who had petitioned for the act of incorporation. Looking at the evidence thus far only, it would seem to be quite too clear for controversy, that, by the act of March 8th, 1844, the Mount Zion Church was incorporated as a parish or religious society, by the name of the proprietors of St. Luke's Church in Chelsea, with power to hold real and personal estate for parochial purposes only. All the male members of Mount Zion Church but one, who was absent, in pursuance of a vote of that parish petitioned to be thus incorporated; and they were thus incorporated, and

Proprietors of St. Luke's Church in Chelsea v. Slack & others.

the act duly accepted. The terms of the act are clear and intelligible, both as to the persons incorporated, and the object of the incorporation. The act is in no way doubtful or ambiguous as to its meaning or purpose. The members of Mount Zion Church are clearly and expressly incorporated, and incorporated manifestly as a parish or religious society, by the name of the proprietors of St. Luke's Church in Chelsea, with the power of holding real and personal property for parochial purposes, and for no other purposes.

But it is said, and said truly, on the part of the respondents, that, from the latter part of September to the early part of December, 1843, and before the application for the act of incorporation, several meetings were held by the subscribers to the stock for the erection of a church or chapel. But there is nothing in the records of the meeting of these subscribers to the stock, showing any intention of these persons to obtain or attempt to obtain any act of incorporation, or to become a corporation. The respondents further say, and say truly, that after the act of the legislature, there were two distinct organizations; that there was an organization of the parish of St. Luke's Church, as one body, and an organization of the proprietors of St. Luke's Church, as another body; and that these two bodies held separate meetings, and chose their separate and appropriate officers, and so continued down to the time of filing this petition; the same individuals, to a considerable extent, forming both bodies, though there were some who acted only in one. These two bodies, the respondents maintain, were two distinct, independent corporations; St. Luke's Church being the same corporation originally organized as a parish under the Rev. Sts. c. 20, by the name of Mount Zion Church, (the name only being changed by the act of the legislature,) and continuing to be and to act as a parish with parish officers; and the proprietors of St. Luke's Church being a new and distinct corporation, originally created by the act of the legislature, not as a parish or for parish purposes, but as a joint stock company, merely with power to hold property and manage financial affairs; that the church and land purchased with the money raised by subscription, and contribu-

tions and other means put in motion by the original parish, with a view to obtain a house of public worship for their parish, belong exclusively to this new joint stock corporation, and not to the parish; that the parish, with their appeal to the public for aid, and their subscription papers, and their efforts towards improving their condition, all along down from 1843, have got a new name and nothing else; that the church edifice, erected in a great measure by the charitable contributions of the christian public to a religious society, and solemnly consecrated for divine service, belongs not to the parish as its place of worship, but to a merely secular, property-holding corporation, whose functions are wholly financial. But it is quite impossible to maintain this view of the case. The act of the legislature of March, 1844, surely did not create a joint stock company; there was no application for such a corporation, and the terms of the act do not import the creation of such a corporation.

The members of an existing parish applied for a change of name and an act of incorporation, for the reasons stated in the petition. The prayer of this petition was granted by the legislature, and an act of incorporation was passed, authorizing the corporation to hold property, to be applied exclusively to parish purposes. This most manifestly was incorporating a parish for parish purposes, and not a joint stock company, merely to hold property. If the corporation, the proprietors of St. Luke's Church in Chelsea, is not a parish but a joint stock company, there is nothing to show who are the members of the corporation, or what individuals are the lawful owners of the land and property which have been occupied by the parish.

It is stated in the evidence, that three persons only of the original contributors of the funds for erecting the church edifice, and whose united subscriptions thereto amounted only to between two and three hundred dollars, are now associated with those who claim to be proprietors of the church edifice. If the corporation of the proprietors of St. Luke's Church in Chelsea are a joint stock company merely, and they own the church edifice and land, there is nothing to limit or

restrict their right. If they have a legal title to the property, there is nothing to show that it is any thing less than an absolute title, so that they may dispose of the property as they please, sell to whom they please, for such a sum as they please, and appropriate the proceeds as they please. And thus all the sums contributed in various ways, to erect a church for a parish, might go to the benefit of a joint stock company, and the parish have nothing.

But this cannot be the just and legal effect of the act of incorporation. The different organizations, which took place after the passage of the act, were irregularities of proceeding, the result no doubt of misunderstanding and mistake. Some of the contributors probably expected to obtain the amount of their contributions in pews, and they took upon themselves the management of the financial affairs. It is a matter of frequent occurrence, that persons contribute to funds for a church, with the agreement that the amount shall be re-paid in a pew or pews. Those of the parish who had not contributed to the fund, generally, if not in every instance, withdrew from the meetings held for financial affairs, doubtless without any particular consideration as to their rights, or of the nature or effect of these separate organizations. But these mistakes and misunderstandings and irregularities of proceedings, cannot alter the law or the legal rights of the parties. There is but one corporation. The legislature did not incorporate a joint stock company, or a corporation empowered merely to hold property; but incorporated certain persons as a parish for parochial purposes, in express terms, by the name of the proprietors of St. Luke's Church in Chelsea. "The proprietors of St. Luke's Church in Chelsea," is the corporate name of the parish, and the property belonging to the proprietors of St. Luke's Church in Chelsea is the property of the parish; and there is no other corporation, and no other persons who have any legal title to such property.

A question was made on the hearing, whether the writ of *mandamus* was the proper form of remedy for the petitioners, even if their claim of right was established; and it was said, that the proper remedy was by *replevin* or *bill in equity*.

Jennings v. Fisher & another.

There was evidence, that the petitioners had endeavored to obtain the books and papers sought for, by a writ of replevin, but without success.

It was said, that the writ of mandamus could not be claimed as a matter of right; and that the application was to the discretion of the court. But this is not an arbitrary discretion; it is a judicial discretion; and when there is a right, and the law has established no specific remedy, this writ should not be denied.

It was further said, that this writ was granted only to prevent a failure of justice, and generally only for some great public purpose. But the value of the matter, or the degree of its public importance, is not to be too nicely and scrupulously weighed. If the writ is to be granted only in a case of public importance, this is a case of public importance. The preservation of the rights, and securing the peace and quiet and order of a parish and religious society, is a matter of great public interest and importance.

This writ is no doubt more freely and frequently granted at the present time than it was formerly. It lies to a former town clerk, or clerk of a company, to deliver to his successor the common seal, books, papers and records of the corporation, which belong to his custody. Indeed, it lies to any person, who happens to have the books of a corporation in his possession, and refuses to deliver them up. In fact, the writ of mandamus is the peculiar and appropriate remedy in a case like the present.

Writ granted.

ABRAHAM G. JENNINGS vs. HERMAN C. FISHER & another.

Since the Rev. Sts. c. 92, §§ 12, 13, one of several joint contractors, who by reason of his absence from the commonwealth is not served with process, in an action brought against them on the contract, cannot be rendered a competent witness for the others, by a release from them of his liability to contribute towards the payment of the debt, in case the plaintiff should recover against them, and they should be obliged to pay it.

This was an action by the indorsee against two of the

Jennings v. Fisher & another.

makers of a promissory note, signed by the firm of Napier, Fisher & Company, of which the defendants were members. Thomas F. Napier, the other member of the firm, and by whom the note was in fact made, was not an inhabitant of the commonwealth, at or since the time of the suing out and service of the writ, was not served with process, and did not appear in the suit. The two partners upon whom the writ was served, appeared and pleaded the general issue, with a specification of defence.

At the trial in the court of common pleas, before *Byington, J.*, the defendants offered Napier as a witness; the plaintiff objected to his competency, on the ground of interest; the defendants thereupon released him from all liability to contribute to them towards the payment of the note, in case the plaintiff should recover against them, and they should be obliged to pay it; the witness was then admitted, and testified in favor of the defendants. A verdict being rendered for the defendants, the plaintiff excepted.

S. F. Plimpton, for the plaintiff.

A. H. Fiske, for the defendants, to the point that Napier was properly admitted as a witness for the defendants, cited *Gibbs v. Bryant*, 1 Pick. 118; *Ames v. Withington*, 3 N. H. 115; *Carleton v. Whitcher*, 5 N. H. 196; *Purviance v. Dryden*, 3 S. & R. 402; *Le Roy v. Johnson*, 2 Pet. 186, 195; *Norman v. Norman*, 2 Yeates, 154.

FLETCHER, J. Of the great number of questions which have been raised in this case, and elaborately investigated and discussed by the respective counsel, it is necessary to consider only one, which is very simple, and entirely decisive of the case.

The ruling of the court of common pleas was in accordance with the practice and rulings of courts heretofore in this commonwealth; and, were it not for the revised statutes, the witness would have stood perfectly indifferent, disinterested and competent, and the ruling would have been correct. But for these statutes, the witness being released by the defendants from his liability to contribute, it would have been a matter of entire indifference to him, whether the defendants or the plaintiff prevailed; as no suit could be maintained

against the witness on the note in either event. If the plaintiff prevailed, and obtained a judgment against the defendants, the witness, not being a party to the judgment, would not be liable on that, and could not be sued on the note without joining his co-promisors; and they could not be joined, as a judgment on the note would have already been obtained against them. If the defendants prevailed, and obtained a judgment in their favor, they would thereby be released from liability on the note; and they being released, the witness would also necessarily be released, as a suit could not be maintained against him as a sole promisor. Such would be the situation of the witness independent of the statute.

But the situation of the witness is most materially altered as to interest by the Rev. Sts. c. 92, § 13, by which it is provided that, in a case like the present, if the plaintiff obtains a judgment against the two defendants, the witness may nevertheless be sued and held liable in a separate action against him on the note. This section was not in the commissioners' report of the statutes, but was one of the amendments added by the legislature. While the statute has thus made a change in the liability of the witness, in case the plaintiff recovers against the defendants, it has not altered the law, as to the witness, in case the defendants prevail; so that, in the latter case, the witness is released from liability on the note, as before the statute. As the law stood, therefore, at the time of this trial, if the plaintiff prevailed against the defendants, the witness would be held liable to a separate action on the note; whereas, if the defendants prevailed, the witness would be released from liability on the note. It is manifest, therefore, that the witness had a direct interest to defeat the plaintiff's suit; and being called by the defendants to testify for them, the witness was interested and incompetent, and should not have been admitted.

The witness being thus incompetent as a witness for the defendants, and the verdict being for the defendants, it must be set aside, and a new trial had in the court of common pleas.

Ilsley v. Merriam.

NATHAN ILSLEY vs. CHARLES MERRIAM.

Where one citizen of this state sells goods here to another, but at the same time discloses to the purchaser the fact, that the goods belong to a citizen of another state, without, however, disclosing the name of the owner, a subsequent discharge of the purchaser under the insolvent laws of this state, is no bar to an action by the owner for the price of the goods.

- THIS was an action of assumpsit, by the plaintiff, a citizen of Maine, residing in Portland, against the defendant, a citizen of Boston, to recover a balance of \$83.91, for hay sold by the plaintiff to the defendant, at different times, from July to September, 1847. The defendant relied in defence upon a discharge in insolvency, obtained by him in May, 1848.

It was in evidence for the defendant, that the hay was sold for cash to the defendant by one Field, a citizen of Boston, and that the bills were all made out in the name of Field, as the vendor.

Field, being called as a witness for the plaintiff, testified, that he sold hay on commission for the plaintiff; and that he communicated to the defendant the fact, that he sold the hay in question on commission, for a person living in Maine, though he was not sure that he mentioned the name of the owner. There was also other evidence, that the defendant knew that Field was dealing on commission for a person in Maine.

The defendant requested the presiding judge of the court of common pleas (*Wells*, C. J.) to instruct the jury that, where a principal resided abroad, the credit and the whole transaction were considered to subsist between the nominal contracting parties, unless there was an express agreement to the contrary; that, in the present case, as the plaintiff had his residence out of the state, he resided abroad within the meaning of the rule; and, therefore, that the discharge in insolvency of the defendant, which was good against Field, was equally so against the plaintiff, unless there had been an express agreement, (of which there was no evidence,) that the transaction was to be considered as a dealing between the plaintiff and the defendant.

The judge declined so to instruct the jury, but instructed them that, if Field in fact sold the hay as the agent of the plaintiff, and communicated to the defendant, and the defendant believed, that he was selling on commission for a principal residing out of the state, the discharge was no bar; and that it was not material that the name of his principal should have been mentioned by Field to the defendant, nor was it material that the bills and transaction were wholly in the name of Field.

The plaintiff having obtained a verdict, the defendant excepted.

G. M. Browne, for the defendant, cited *Brigham v. Henderson*, 1 Cush. 430, and cases cited; *Bank of Alabama v. Dalton*, 9 How. 522; *St. 1845, c. 193*; *Sims v. Bond*, 5 B. & Ad. 389, 393; *Story on Agency*, §§ 160a, 267, 269; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 381; *Drinkwater v. Goodwin*, Cowp. 251; *Jones v. Littledale*, 6 Ad. & El. 486; *Dwight v. Whitney*, 15 Pick. 179; *Smyth v. Anderson*, 7 Man. G. & S. 21, 35; *Thomson v. Davenport*, 9 B. & C. 78; *Higgins v. Senior*, 8 M. & W. 834, 844; *Baring v. Corrie*, 2 B. & Ald. 137, 148.

L. Mason, for the plaintiff.

DEWEY, J. It is a well established principle, that if a factor sells the goods of his principal, an action to recover the price thereof may be brought either in the name of the factor or of the principal. Nor does it make any difference, that the name of the principal was not disclosed. *Story on Agency*, § 420. The question in this case is, therefore, the mere question as to the defence arising from the discharge obtained by the defendant under the insolvent law of Massachusetts; and the point for inquiry is, whether such discharge can affect the plaintiff under the circumstances of the case.

Treating the case as a contract made directly with the plaintiff, and rejecting from our consideration the fact of the sale being made through an agent in Massachusetts, the case would seem to fall clearly within the cases of *Savoie v. Marsh*, 10 Met. 594, and *Fiske v. Foster*, 10 Met. 597; where, upon much consideration, the court came to the opinion, that, giv-

ing full effect to the decisions of the supreme court of the United States, a discharge under our insolvent laws would not discharge a debt contracted with a citizen of another state.

But it is contended, that, in the case of a sale through an agent, and under the circumstances here stated, the rights of the parties, in reference to a discharge under our insolvent laws, are materially different. The position taken by the defendant is, that Field, the agent, having made the contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation, in all respects, as if Field had been the real party in interest. Is this a correct view of the law on this point? There is no doubt that the principal, who thus assumes a contract made by his agent, must take it subject to all the equities that would avail the defendant if the agent were the plaintiff; or, to state the principle in other language, the principal "must take them with all the attendant burthens, and subject to all the attendant just counter claims and defences of the other contracting party." Story on Agency, § 419. But, in the opinion of the court, the right to set up a discharge in insolvency, under the insolvent laws of Massachusetts, as against all suits by citizens of Massachusetts, is not embraced within any equity or just counter claim, such as is contemplated in the books of authority enunciating this general principle of defence. It is attempted to be applied here, where the only matter on which it rests is a local statute, having no effect except as to citizens of Massachusetts. The fact having been disclosed to the defendant at the time of the purchase, that the agent was selling on commission for a principal, residing in the state of Maine, as must now be taken to have been found by the jury, under the instructions given them, the case is not open to any objections of surprise or deceit, in the manner the agent treated with the vendor, as to the principal.

Without expressing any opinion beyond the present case, we are satisfied that the instructions are not liable to any objection on the part of the defendant.

Exceptions overruled.

WILLIAM M. HATSTAT vs. SYLVANUS PACKARD.

The recovery of a judgment, by the lessor against the lessee, for possession of the premises leased, puts an end to the right of one occupying a portion of the same under the lessee, by his verbal permission.

THIS was an action of trespass *quare clausum fregit*, the writ containing also a count for an assault; and was tried in this court, before *Fletcher, J.*, by whom it was reported in substance as follows:

The premises in question, being part of a store on Commercial Street, were owned by the defendant, who, on the 1st of January, 1846, demised the store to one Gates, for five years, by an indenture containing a covenant, on the part of the lessee, not to underlet without the consent of the lessor in writing. Gates, afterwards, without such consent, underlet the lower floor and cellar of the premises, by a lease containing a similar covenant, to one Eldredge, from whom, by successive assignments, it came to William M. Hatstat and Company. Gates occupied the residue of the premises until dispossessed thereof in the manner hereinafter mentioned. Hatstat and Company transferred their lease to one Staniels, who was in the possession of the store at the time of the alleged trespass, and gave the plaintiff a verbal permission to remain in the cellar, paying rent to him therefor.

The defendant gave in evidence a certified copy of a judgment of the justices' court for this county, rendered in his favor, on the 19th of January, 1848, against said Gates and Staniels, and one Knight, for possession of the store leased by him to Gates. Under the execution issued on this judgment, an officer took possession of the premises, delivered the same to the defendant, and on the 25th of January, 1848, returned his doings on the execution. The officer also notified the plaintiff that he must remove forthwith, or he would be put out.

The plaintiff's property was removed from the cellar, on the 29th of January, 1848, in the night time, and in the absence of all persons from the store, and when he came there on the morning of the 30th, he found the cellar door barred against

Hatstat v. Packard.

him, and attempted to break in with a hammer, but was restrained by Gates and a policeman, who used no more force than was necessary for the purpose. The acts done in removing the plaintiff's goods, and in preventing him from breaking into the premises, were done by the orders and under the direction of the defendant.

Upon this evidence, the presiding judge ruled, that the plaintiff could not maintain trespass *quare clausum*; and that as it appeared, that no more force was used than was necessary to prevent the plaintiff from breaking the door, the defendant was entitled to a verdict, on the count for an assault. The jury thereupon returned a verdict on both counts for the defendant. If the ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered on the verdict.

C. M. Ellis, for the plaintiff.

P. W. Chandler, for the defendant.

FLETCHER, J. Packard, the defendant, took peaceable possession of the cellar of a building, of which he was himself the lawful owner. For thus taking peaceable possession of his own premises, Hatstat brings this action of trespass *quare clausum fregit* against him. But what right had Hatstat? The case finds, that Staniels gave Hatstat a verbal permission to remain in the cellar, Hatstat paying the rent therefor to him. Hatstat, therefore, had just such right, as the verbal permission of Staniels to him to stay there could give, and no more. He could have no better right than Staniels had. What right then had Staniels there? Clearly no right at all. Packard had obtained a judgment and writ of possession against Staniels, and by virtue of this process, had put Staniels out, and put an end to all his right, and, of course, an end to all Hatstat's right of possession. It was said by the counsel, at the argument, that the ruling of the judge at the trial, that the action could not be maintained, deprived the plaintiff of the opportunity of showing that the judgment, recovered by the defendant against Staniels and others, was fraudulent and void. But Hatstat was no party to that judgment, and the judgment was not used against him, but against Staniels, and

Maynard v. Frederick.

it was no doubt a good judgment against Staniels, who did not question its validity. It was not for Hatstat to impeach a judgment against Staniels, which Staniels himself did not impeach, and to which Hatstat was no party. Hatstat, having no legal right to the premises in question, could not maintain an action of trespass *quare clausum*. The count for an assault cannot be maintained, as nothing was done but to prevent Hatstat from committing an unlawful act of violence upon the property of the defendant, and to protect the defendant in the rightful possession of his own property.

Judgment on the verdict.

AZOR MAYNARD vs. JABEZ FREDERICK.

It is no ground for setting aside an award, that the arbitrators did not examine the witnesses under oath; especially when no objection was made at the time to the manner of examination.

Arbitrators, who are authorized by the submission to inquire into all matters arising out of the trade and dealing of the parties, without restriction as to time, may go behind a receipt given by one of the parties to the other, and look into the settlement on which the receipt was founded.

A submission to arbitrators having provided, that the award to be made up by the arbitrators, or by a majority of them, should be final and binding upon both parties; two of the arbitrators, at a regular meeting for the purpose, at which all three were present, agreed upon an award, which was then drawn up and signed by one of them; the other took time to deliberate, and afterwards signed it; but the third refused to agree to the award, and never signed it. It was held, that the award was valid.

Arbitrators have no power to award costs, unless authorized by the submission.

When arbitrators, not authorized by the submission to award costs, make an award that one party pay the other a certain sum of money, and an additional amount for costs of arbitration, the part awarding costs may be rejected, and the remainder stand good.

THIS was an action of covenant broken, on an award of arbitrators. The submission, which was under seal, bore date of the 8th of July, 1847, and was of all matters of difference arising out of the trade and dealings of the parties themselves

Maynard v. Frederick.

and with other persons, and provided, that the award so to be made up by the arbitrators, or by a majority of them, should be final and binding upon both parties, and should be in full settlement and discharge from one to the other, of and concerning and in respect to their said trade and dealings, from the commencement thereof to the date of the submission. The award of the arbitrators was that Maynard should recover of Frederick the sum of two hundred and twenty dollars and eighty seven cents, with interest from the date of the award, together with the costs of the reference, amounting to the sum of fifteen dollars, and that the same should be in full of all matters referred to them.

At the trial in the court of common pleas, before *Wells, C. J.*, it was in evidence, that the witnesses before the arbitrators were not sworn, and did not testify under oath; that Lovejoy, one of the arbitrators, refused to agree to the award, and did not sign it, and that at the last meeting of the arbitrators, when they were all present, Lord, the chairman, drew up the award, and signed it; Lovejoy refused to sign it, and Whittier, the third arbitrator, then refused to sign it, alleging that Lovejoy's refusal made it necessary for him to give the subject more consideration. In a day or two afterwards, a messenger called, and asked him to go to Lord's. He went accordingly, and conversed with Lord about the award, and then signed it; Lovejoy not being present, or notified of the meeting. The chairman afterwards sent the award to Lovejoy, who again refused to sign it. The plaintiff, on his part, introduced evidence, that at the meeting above mentioned, two of the arbitrators agreed upon the award to be made, whereupon the chairman drew it up and signed it; that Lovejoy refused to sign it, and then Whittier said, that in consequence of this refusal, he would take time to consider, and the arbitrators separated; that upon reflection Whittier decided to sign it, and upon a request to go to Lord's place of business for this purpose, he went and did sign the award, in pursuance of his previous determination, and without being influenced by any suggestion then made; and that Lovejoy was not present, at this time. It also appeared that the arbitrators went behind a receipt,

given by one of the parties to the other, bearing date the 14th of April, 1847.

The defendant objected to the validity of the award: 1st. That the witnesses should have been sworn; 2d. That the award should have been agreed to and signed by all the arbitrators; 3d. That as Whittier signed it under the influence of Lord, at a meeting when Lovejoy was neither notified nor present, the award did not conform to the law, nor to the terms of the submission; 4th. That there was no sufficient evidence that the award was submitted to Lovejoy; and 5th. That the arbitrators exceeded their authority in going behind the receipt of April 14th, 1847.

The presiding judge overruled these objections and instructed the jury, that it was not necessary that the witnesses should be sworn; nor that the award should be agreed to and signed by all the arbitrators; and that to render the award binding, it was necessary that, at a regular meeting of the arbitrators, a majority should agree upon the award to be made; but if such an award was agreed upon, and then reduced to writing and signed by one of the assenting arbitrators, and the other, who had previously agreed to it, took some further time to reflect upon the subject, and after reflecting decided to adhere to his former determination, and then voluntarily, and without being influenced by any one, signed the award, the award would be valid, so far as this objection was concerned; that it was necessary that Lovejoy should have been notified to be present when the award was agreed upon, and it was for the jury to decide whether he was notified, or present, and had reasonable opportunity to assent or object to the award; and that the arbitrators had the right to go behind the receipt, if, in their opinion, it was necessary, in order to a just and equal settlement of the concerns of the parties.

The jury, under these instructions, returned a verdict for the plaintiff, and the defendant excepted.

The defendant objected further, in this court, that the arbitrators had awarded costs, which, by the submission, they were not authorized to do

J. C. Park, for the defendant.

C. T. Russell, for the plaintiff, was called upon to speak only to the point of costs.

BIGELOW, J. This case comes before the court upon exceptions taken by the defendant to the ruling of the court of common pleas, on objections made at the trial to the award relied on by the plaintiff.

1. The first objection is, that the witnesses examined before the arbitrators were not sworn. It is well settled, that referees are not bound by the strict rules of law as to the admission of evidence. They may examine witnesses interested in the event of the suit, who would be incompetent in a court of law; and the reason given is, that arbitrators are the sole and exclusive judges both of law and fact. *Watson on Arb.* 75; *Fuller v. Wheelock*, 10 Pick. 135. And they may examine the witnesses either under oath or not at their discretion. It was long since adjudged, that it is no ground for setting aside an award, that the arbitrators did not examine the witnesses under oath; more especially, when no objection was made at the time by the parties to this mode of taking the testimony. *Watson on Arb.* 170; *Ridoat v. Pye*, 1 Bos. & Pul. 91; *Hall v. Lawrence*, 4 T. R. 589; *Fox v. Hazelton*, 10 Pick. 275; *Patten v. Hunnewell*, 8 Greenl. 19. Parties cannot be permitted to lie by, making no objection to the forms and mode of proceeding before the arbitrators, taking their chance for a favorable result, and when they find the award to be adverse, avail themselves of such grounds to get rid of it. In such cases silence is acquiescence, and amounts to a waiver of all objections to irregularities in the proceedings.

2. The second objection is, that the arbitrators exceeded the submission, because they went behind a receipt in full, which had passed between the parties on the 14th of April, 1847. The validity of this objection must depend on the terms of the submission. On looking into it, we find the agreement is to submit all matters arising out of the "trade and dealings" or "trade and business" of the parties, and "that the award shall be in full settlement and discharge from one to the other concerning and in respect to their said trade and dealings,

from the commencement thereof to the date of the submission." Now there can be no doubt that this language is sufficiently comprehensive to authorize the arbitrators to go behind the receipt and look into the settlement. There was no limit in the submission as to the time to which the arbitrators were to confine themselves in their investigation of the dealings between the parties. They were not restricted to matters arising subsequent to the date of the receipt. A receipt is not conclusive upon the parties. It might have been given by mistake, or obtained through fraud, or founded on errors in calculation; all this was open to the parties, and comes within the reasonable interpretation of the language of the submission. If the arbitrators had refused to go behind the receipt and look into the settlement upon which it was given, at the request of either of the parties, we think it would have afforded a much stronger reason for setting aside the award than the objection now taken by the defendant.

3. The next objection seems to us to be equally unfounded. It is, that there was no consultation among the arbitrators previous to making up the award. This position is not supported by the facts as reported in the bill of exceptions, and is negatived by the finding of the jury under the instructions of the court. The jury were distinctly instructed, that in order to render the award binding, it was necessary that, at a regular meeting of the arbitrators, a majority of them should agree upon the award. How then can it be said that there was no consultation? The jury have found, that there was a regular meeting of all the arbitrators, and that at such meeting the award was agreed to by a majority. This implies a consultation; all, certainly, that was necessary to give validity to the award. But it is said that the facts show, that when the arbitrators met, one of them refused to assent to or to sign the award. This does not vitiate it, if a majority had power to act; and after his absolute refusal to sign the award to which the other two had agreed, it was no longer necessary to consult or even meet with the dissenting arbitrator. *Carpenter v. Wood*, 1 Met. 409. It is further contended, that after the refusal of one of the arbitrators to sign the award,

Maynard v. Frederick.

one of the other two, who had previously agreed to it, wished to take more time to think over the matter, and after a delay of two or three days signed the award, and that this shows there was no consultation among the arbitrators. We do not so regard it. He had agreed to the award at a regular meeting of all the arbitrators. There was no need of future consultation, unless he changed his mind. The whole matter was completed, except affixing his signature to the award. This was afterwards done, and has the same effect as if it had been done when all were present. We think, therefore, that the evidence shows a sufficient consultation, and that the instructions of the judge, and the finding of the jury on this point, are well warranted by the facts.

4. The fourth objection taken by the defendant is, that the award is signed and agreed to only by a majority, and that it should have been unanimous. This would have been a valid objection, but for the terms of the submission. *Thorne v. Jaquith*, 6 Mass. 46. It is expressly agreed by the parties "that the award, so to be made up by said referees, or by a majority of them, should be final and binding upon both parties." The construction contended for by the defendant, "that it meant that a majority might sign and report the award, but that all must assent to it," seems to us to be unreasonable and without any foundation.

5. The only remaining objection is, that the arbitrators had no power to award costs. This objection is well taken. *Peters v. Peirce*, 8 Mass. 398; *Vose v. How*, 13 Met. 243. But this will not vitiate the award. It is well settled that when a part of an award is bad, and such part does not form a portion of the consideration for the performance of that part of the award which is valid, and is distinct and independent thereof, then the award is only void for so much, and is good for the rest. *Whitehead v. Firth*, 12 East, 165, 167; *Kyd on Awards*, (2d ed.) 245; *Strutt v. Rogers*, 7 Taunt. 213, 216; *Shirley v. Shattuck*, 4 Cush. 470. Such being the case here, and the costs being given in a separate amount, the plaintiff can remit on the record so much of the verdict as is equal to the amount of costs awarded, and thereupon the

Exceptions must be overruled.

JOSHUA PRAY vs. SEBEUS C. MAINE.

P. made a promissory note to secure a debt from him to the payee; and W., before its delivery, put his name on the back of it: W. afterwards paid the debt, and the payee indorsed the note to him. It was held, that by the payment of the debt, the note was extinguished, and could not afterwards be put in circulation by W. as against P.

THIS was an action of assumpsit. The defendant filed in set-off a promissory note for \$100, payable to Chandler & Maine, or their order, signed by the plaintiff, and indorsed "Chandler & Maine to Wingate," underneath which indorsement appeared the name of "Andrew T. Wingate," erased.

At the trial in the court of common pleas, before *Perkins, J.*, it appeared that the signature of Andrew T. Wingate, mentioned in the indorsement, was put on the note for a good consideration, at the time that the note was signed by Pray, and before it was delivered to Chandler & Maine; to whom it was given for the purpose of securing the payment of expenses incurred and services performed by them as attorneys in relation to the proceedings upon an application for the benefit of the insolvent laws, which Pray was about to make. Wingate afterwards paid \$81 in full of said services and expenses, and Chandler & Maine thereupon surrendered the note to him, and made the indorsement above mentioned. At the time the note was made, Wingate owed Pray \$100, \$50 of which he had since paid; so that after he had paid the \$81 to Chandler & Maine, Pray owed Wingate \$31. Wingate then sold and delivered the note to Maine for \$31, without indorsing it.

The judge, at the request of the plaintiff, ruled that the defendant could not avail himself of this note in set-off to the plaintiff's demand, to which ruling the defendant excepted.

Joel P. Bishop, for the defendant.

F. W. Sawyer, for the plaintiff.

SHAW, C. J. No title is shown by the defendant to the note relied upon as a set-off. Wingate, though he put his name on the back of the note, was still a promisor to Chandler &

Smith v. City of Boston.

Maine, as settled in *Hunt v. Adams*, 5 Mass. 358, and 6 Mass. 519. The note was therefore extinguished, by payment by a promisor, who could not again put it in circulation as against a co-promisor. The only right that Wingate derived, or could derive, from the payment thus made by him as surety and co-promisor, was to claim the amount of Pray for money paid at his request, and for his use, and that right was not negotiable.

Exceptions overruled.

EBENEZER SMITH vs. THE CITY OF BOSTON.

The discontinuance of part of a street in a city, by order of the mayor and aldermen, whereby the value of lands abutting on other parts of the street, and on neighboring streets, is lessened, is not a ground of action against the city by the owner of such lands, if still accessible by other public streets.

THIS was a petition for the assessment of damages alleged to have been done to the plaintiff in his property, by the discontinuance of a portion of Market Street in the city of Boston, by order of the mayor and aldermen. The trial was before *Bigelow, J.*, in the court of common pleas.

The discontinuance complained of was of that part of Market Street covered by the tracks of the Boston and Maine Extension Railroad, the proprietors of which had been permitted by their charter to extend their road through part of the city. The petitioner owned several lots on and near Market Street, and offered to prove that the value of each had been lessened, and the rent of one or more of them diminished; but it appeared that no one of the parcels bounded on that part of the street which had been discontinued, and that all were accessible by other public streets. The presiding judge ruled, that the petitioner was not by law entitled to prove and recover any damages, because neither of his estates abutted on that part of Market Street, which was discontinued; and, by his direction, a verdict was entered for the

respondents; whereupon the petitioner excepted to this ruling.

B. R. Curtis, for the petitioner, cited *Rev. Stats. c. 24, §§ 11, 31*; *Ashby v. Eastern Railroad*, 5 Met. 368; *Boston & Roxbury Mill Corporation v. Gardner*, 2 Pick. 33; *Palmer Co. v. Ferrill*, 17 Pick. 58, 64; *Stetson v. Faxon*, 19 Pick. 147.

P. W. Chandler, city solicitor, for the defendants, cited *Commonwealth v. Norfolk*, 5 Mass. 435; *Callender v. Marsh*, 1 Pick. 418, 432; *Patterson v. Boston*, 20 Pick. 159, 166; *Tisdale v. Norton*, 8 Met. 388; *Meacham v. Fitchburg Railroad*, 4 Cush. 291; *Sedgw. on Damages*, (1st. ed.) 63, 64; 2 Greenl. Ev. § 256; *Loker v. Damon*, 17 Pick. 284.

SHAW, C. J. The court are of opinion, that the direction given by the judge at the trial was correct, and that the inconvenience sustained by the petitioner, if any, was not such an injury done him in his property, as to entitle him to damages within the true intent of the law. There is obviously a difficulty in laying down a general rule applicable to all cases. One limit however must be observed, which is, that the damage for which a recompense is sought, must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more, in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific. The creation of a public nuisance, by placing an obstruction in a highway, can only be punished and suppressed by a public prosecution; and though a man, who lives near it, and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public. But if he suffers a peculiar and special damage, not common to the public — as by driving upon such an obstruction in the night, and injuring his horse — he may have his private action against the party who placed it there. The damage complained of in this case, though it may be greater in degree, in consequence of the proximity of the pe-

tioner's estates, does not differ in kind from that of any other members of the community who would have had occasion more or less frequently to pass over the discontinued highway. The petitioner has free access to all his lots, by public streets. The burden of his complaint, therefore, is, that in going to some of his houses, in some directions, he may be obliged to go somewhat further than he otherwise would. So must the inhabitant of the south end of the city, or the citizens of other towns, with their teams or carriages, who would have had a right to use the discontinued way. Upon the question of public convenience, it is the province of the mayor and aldermen, upon a balance of all considerations bearing upon it, to decide. It is not to be presumed that they will discontinue a highway once laid out, unless the considerations in favor of the discontinuance decidedly preponderate.

In this case, the rule adopted by the judge seems to have been well adapted to the circumstances of the case, and well guarded; it was limited to damage done to some estate bounding on the highway discontinued. It has been held, that in assessing damage for land taken for a railroad, it is not competent to give in evidence, by way of set-off, the benefit done to other lands of the claimant, not connected with the land taken, by the establishment of the railroad. *Meacham v. Fitchburg Railroad*, 4 Cush. 291. It seems to us that this case falls under the same principle. For if the petitioner could give in evidence injury to estates not bounding on the street discontinued, it would be competent for the respondents to show, that the street was discontinued in consequence of the railroad, and the better to secure the safety and convenience of the travel incident to it; and then show, by way of set-off, any benefit done to any of the petitioner's real estate situated anywhere near the railroad. This would be inadmissible, upon the rule stated, which is founded on the consideration, that the general benefit, which a town or a village derives from a railroad, is common and general to all, which one, a portion of whose land is taken for it, is no more bound to pay for, than any other person deriving a benefit in common, from public improvements. *Palmer Co. v. Ferrill*, 17 Pick. 58.

We do not mean to be understood as laying down a universal rule, that in no case can a man have damages for the discontinuance of a highway, unless his land bounds upon it; although as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the public way. If this is discontinued, he must lose the benefit of his estate, or open a way at his own expense, which might be a direct and tangible damage, consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute.

Exceptions overruled.

FREDERICK W. ROBINSON vs. AZEL HOWARD & Trustee.

An officer is not liable, by the trustee process, to a creditor of a person arrested by him on a criminal warrant, for money or other property, taken by the officer under color of his official duty, from the person of his prisoner, and for which he gives the latter a receipt.

THIS was an appeal from the judgment of the court of common pleas, discharging James W. Pierce, the alleged trustee, upon his answers, which were substantially as follows: Prior to the service of the writ, the plaintiff complained against the defendant in the police court of the city of Boston, for larceny, by stealing a note of hand, alleged to have been delivered to him for the purpose of getting it discounted. Upon this complaint a warrant was obtained, and placed in the hands of Pierce as an officer and constable, for service; and he, accompanied by the plaintiff, proceeded to Greenfield, in the county of Franklin, and there arrested Howard. Soon after the arrest, Pierce stated to Howard, that it was his duty as an officer to take from him every thing of value which

Robinson v. Howard & Trustee.

might enable him to effect an escape between Greenfield and Boston. Howard protested against the proceeding, and alleged that the note, with the stealing of which he was charged, was payable to his own order. Pierce took from him \$175 in money, and sundry small articles of the value of \$10. In the course of the return to Boston, Pierce learned such facts from Robinson as satisfied him that no larceny had been committed, and on the morning after his arrival in Boston, went to the jail to return the property to Howard. When upon the platform of the jail, the present trustee process was served upon him. Within a few hours afterwards, Howard's case was examined in the police court, and he was discharged.

In this court, the alleged trustee, being further interrogated, disclosed, that when he took the articles from Howard, as before stated, he gave him a paper acknowledging that he had taken them from him, and he thought he added the words "when arrested on a charge of larceny;" that he did this to avoid future controversy about what he had taken, and so that there might be something to show how he became possessed of the property, in case any accident should happen to him with it in his possession.

A. H. Fiske, for the plaintiff, cited *Cush. Trustee Process*, 16 to 19; *Swett v. Brown*, 5 Pick. 178; *Allen v. Hall*, 5 Met. 263.

J. C. Park, for the trustee.

SHAW, C. J. The court are of opinion, that the judgment of the court of common pleas ought to be affirmed, and the trustee discharged. The trustee was an officer charged with the service of criminal process, issued on the complaint of this plaintiff. He acted by color of his office, and, as incidental to the service of the process, took from the trustee the money and property in question, declaring it to be in performance of his official duty, which was to carry the defendant before the examining magistrate. The prisoner could make no resistance, and in no other way express his objection and dissent, than by protesting, which he did. We think that both the officer, and the plaintiff who claims through him, are estopped to deny that in this respect he acted officially. He is there-

 Baker v. Moffat & another.

fore within the spirit, if not within the letter of the Rev. Sts. c. 109, § 30, clauses 2 and 3. The property was taken by him as a public officer, performing an official duty. We should fear that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable by trustee process.

The receipt, disclosed in the last examination, given by the officer to the person arrested after the arrest, appears to us to make no difference. It was a mere certificate of the fact that he had taken the property, to give the defendant the benefit of it as proof, and also exempt himself from the charge of any unlawful intent in taking it.

Trustee discharged.



WILLIAM P. BAKER vs. JOHN H. MOFFAT & another.

The certificate of two justices, in the form prescribed by the Rev. Sta. c. 98, § 10, upon administering the poor debtor's oath, stating that the debtor had caused the creditor, at whose suit he is confined, to be notified according to law, is not conclusive of the regularity of the notice.

The provision of St. 1848, c. 286, § 1, that when a debtor "shall have given to the creditor notice of his intention to take the benefit of the law for the relief of poor debtors, no new notice of the same intention shall be given, until the expiration of seven days from the service of the former notice," applies to a case, where the first notice is defective and insufficient. [But see St. 1850, c. 212.]

BIGELOW, J. This is an action of debt on a bond given for the prison limits. The question presented on the agreed statement of facts is, whether the defendant Moffat duly complied with the requisitions of the statutes for the relief of poor debtors, and was thereby legally discharged from custody. The defect in the proceedings relied on by the plaintiff is, that there was no legal service on the creditor of the cita-

tion to take the poor debtors' oath. The decision of this question depends on the construction of the statute of 1848, c. 286, § 1. Preliminary to this inquiry, however, it is necessary to consider an objection made by the defendant, which, if valid, would dispose of the case at once. The certificate of the magistrates is in the form prescribed by the Rev. Sts. c. 98, § 10, and, among other things, certifies that the creditor was duly notified. It is contended by the defendant, that this certificate is conclusive on the plaintiff, and that he cannot go behind it and offer evidence to control or contradict it. This point is not now raised for the first time, and it is sufficient to say, that it has been repeatedly, and quite recently, overruled by this court. *Putnam v. Longley*, 11 Pick. 487; *Slasson v. Brown*, 20 Pick. 436; *Ward v. Clapp*, 4 Met. 455; *Young v. Capen*, 7 Met. 287. The dictum in *Haskell v. Haven*, 3 Pick. 408, relied on by the defendant, has long since been reconsidered and overruled. 20 Pick. 439. And it must now be regarded as the settled law in this commonwealth that, in a suit on a bond for the prison limits, the creditor may go behind the certificate, and show informality in the notice to the creditor, or in the proceedings before the magistrates, for the purpose of charging the sureties on the bond. The certificate is only conclusive for certain purposes. It entitles the debtor to his discharge from custody by the jailer, and is a sufficient warrant to the jailer for such discharge; and it exempts the debtor forever afterwards from arrest or imprisonment for the same debt; Rev. Sts. c. 98, §§ 11, 14; but, beyond this, it has no conclusive effect.

Turning now to the consideration of the main point in the case, it appears, by the agreed statement of facts, that a citation was served on the creditor, on the 17th of March, 1849; but it was supposed that this citation was invalid, because there was an error in its date, and in the time fixed for the examination of the debtor. It was therefore abandoned, and another notice was then served, on the 22d of March, fixing the time for taking the oath on the 26th of March; and on this last-named day, the debtor took the oath, and received the certificate of the magistrates; after

Baker v. Moffat & another.

which, and before the expiration of the ninety days, he went beyond the prison limits. It is therefore admitted, that five days only elapsed between the service of the citation, on the 17th of March, and the service of that on the 22d, under which the debtor was discharged. Now, by the statute of 1848, c. 286, § 1, it is enacted, that when a debtor "shall have given to the creditor notice of his intention to take the benefit of the law for the relief of poor debtors, no new notice of the same intention shall be given, until the expiration of seven days from the service of the former notice." It would seem, therefore, looking only at the letter of the statute, that the notice of the 22d of March, under which the debtor was admitted to the oath and discharged, was clearly invalid, being given only five days after the former notice.

But it is contended on the part of the defendant, and for the purposes of the argument it may be conceded, that the notice of the 17th was illegal and void, on account of the error in its date. This being so, he further contends that it is to be treated as a nullity, and has no effect to invalidate the notice given on the 22d; in other words, that the meaning of the statute is, that no new notice shall be given until the expiration of seven days from the service of a former valid notice; and that the former notice in this case, being illegal and invalid, is to be disregarded and treated as a nullity.

The most obvious consideration which suggests itself on this construction of the statute is, that such is not the language used by the legislature; and, in order to give effect to such an interpretation, it would be necessary for a judicial tribunal not merely to give a true meaning to words actually used in the statute, but to insert qualifying expressions which the legislature have omitted.

But the more decisive answer is, that such a construction, so far from carrying out what seems to have been the object of the statute, has a direct tendency to defeat it. The manifest intent of the legislature, in requiring an interval of seven days between the service of two citations, was to prevent the

debtor from harassing his creditor by successive and repeated notices, given as often as the pleasure or caprice of the debtor might dictate. It was intended to operate as a sort of penalty on the debtor for giving an ineffectual or informal notice, and compelling the creditor to incur the expense and trouble of a useless attendance at the time and place appointed for the examination. To hold that an illegal and informal notice did not come within the statute, so as to defeat a new notice, given before the expiration of seven days, would take away the salutary restraint which the statute intended, in this particular, to impose on the debtor. One great purpose of the system of imprisonment for debt, as it is now modified by modern philanthropic enactments, is to enable the creditor to put his debtor on examination, and search his conscience as to his property and means of payment. To effect this object, the personal attendance of the creditor or his attorney is necessary; and if he omit to attend at any time appointed by a citation, the opportunity for such examination may be lost. Now the creditor cannot decide upon the sufficiency of a citation. The defect may be latent, or it may be questionable whether there is any defect; and it may be quite uncertain whether the magistrates will hold it to be a good or an invalid citation. The creditor, therefore, must take upon himself the responsibility of deciding that the notice is not valid, or he must attend at the time and place appointed, in order to avail himself of his legal rights. Whether the notice be informal or regular, the attendance of the creditor may be equally necessary. It is very plain, then, that the mischief which the statute intended to remedy would not be reached, if the construction contended for by the defendant should prevail.

And this view is greatly strengthened by a consideration of § 39 of c. 98 of Rev. Sts. By that section it was provided, that no new notice of an intention to take the poor debtors' oath should be given, until the expiration of thirty days from the service of the former notice, unless said former notice was ineffectual from some defect therein, or in the service thereof. The statute of 1848, now under consideration, was a substitute for this provision, and repealed that section of the re-

Knight v. Fifield & another.

vised statutes. The legislature shortened the interval between the notices from thirty to seven days, and at the same time omitted the clause in the revised statutes which rendered the prohibition inoperative in case the previous citation was informal or defective. This omission must have been intentional. The legislature, acting on this same subject, repealing the old law and substituting a new one, carefully omitted a clause which gave an important qualification to the former statute. The defendant now asks us so to construe the new statute as to insert in it substantially the same provisions which the legislature have studiously omitted. But this cannot be done without violating every sound rule of construction.

For these reasons, without considering the other questions presented by the statement of facts, and argued by counsel, the court are very clearly of the opinion, that the notice of the 22d of March was invalid, because it was served before the expiration of seven days from the service of the previous notice.

Judgment for the plaintiff.

H. C. Hutchins, for the plaintiff.

H. A. Scudder and *J. Q. Kettelle*, for the defendants.

.BENJAMIN KNIGHT vs. JOHN C. FIFIELD & another.

When a creditor, who has committed his debtor in execution, lives out of the commonwealth, but has two attorneys of record, partners in business, within the same, it is a sufficient service of a citation, giving the creditor notice of the debtor's intention to take the poor debtors' oath, if the officer returns that he has given "an attested copy" of the citation to such "attorneys."

THIS was an action of debt on a bond for the prison limits, in usual form, and came up by appeal from the court of common pleas, after a judgment for the defendant in that court on an agreed statement of facts. The defence relied on was a discharge within the ninety days limited by the condition, by

Knight v. Fifield & another.

taking the poor debtors' oath, which was duly certified to the jailer. The plaintiff objected to the validity of this discharge, for want of legal and sufficient notice to the creditor of the time and place appointed for the examination and taking the oath. The creditor lived out of the state, and his attorneys were Messrs. Hutchins & Wheeler, partners in the business of attorneys at law, in Boston, in the county of Suffolk, where the judgment was rendered. An officer, duly qualified, returned that he had served the citation on the said Benjamin Knight, "by giving in hand an attested copy to Messrs. Hutchins & Wheeler, his attorneys of record." The objection was, that the return showed but one copy, and could not be good service on two persons.

H. C. Hutchins, for the plaintiff.

H. A. Scudder, for the defendants.

SHAW, C. J. The court are of opinion, that this citation was well served on the creditor. Rev. Sts. c. 98, § 3. The creditor was out of the state. Messrs. Hutchins & Wheeler were the attorneys who prosecuted the suit and obtained the judgment. The statute does not, in terms, require several notices to several attorneys; it speaks of the "attorney." The general rule is, that when two or more persons are subject to a joint duty or obligation, upon notice, and when other special notice is not made necessary, by statute or by contract, a notice addressed to all, and served on one, is notice to all. *Morse v. Aldrich*, 1 Met. 544, and cases there cited. *A fortiori*, when several are attorneys at law and partners, exercising a joint power for one and the same principal.

But, taking the return to be true, and giving it a strict and literal construction, it is well enough. There is no impracticability in delivering one paper to two persons sitting or standing together; or in delivering it to one, in the presence and hearing of both, and saying it is for them; or in handing it to one, and then, by consent, taking it and handing it to the other. That it was delivered to both, is not more improbable, in fact, than the case where an officer returned that he had summoned three creditors by leaving "a copy" at their last and usual place of abode; in which case, if the return was

Park v. Johnston & others.

true, they must all have had one and the same place of abode. But it was held, as that was not impracticable, that the return must be taken to be true, and could not be limited or enlarged by evidence *abunde*. *Leach v. Hill*, 3 Met. 172.

By St. 1844, c. 154, § 4, provision is made, that service on one plaintiff, or one agent or attorney, shall be sufficient. But it is insisted, that if the defendants relied on this statute, it must appear by the return, which attorney it was served upon, which does not appear in this case. But we think, for reasons already stated, that this case does not depend on that statute, because the notice was sufficient without, which renders it unnecessary to consider that objection.

Judgment affirmed.



THOMAS D. PARK vs. WILLIAM JOHNSTON & others.

A citation, issued under St. 1844, c. 154, to a creditor, to attend at the examination of a debtor, arrested on mesne process at his suit, and desirous to take the poor debtor's oath, must be served on the creditor at least twenty four hours before the time appointed for the examination, adding one hour for travel for each mile from the place of service to the place appointed for the examination; and an officer's return stating that he served the citation on the creditor on a certain day, without specifying the hour, when in fact the notice was sufficient if served before, but not if served after, a certain hour on that day, is not sufficient evidence that the citation was duly served.

In this case, which was argued by *H. C. Hutchins*, for the plaintiff, and *G. Minot*, for the defendants, the facts are stated in the opinion, which was delivered at March term, 1852.

BIGLOW, J. This is an action of debt on a bond given for the prison limits; and the breach relied on is, that the debtor did not surrender himself to the jailer, at the end of ninety days, to be held in close confinement. The defendants rely for their defence upon the ground, that the condition of the bond has been otherwise fulfilled, to wit, by the due discharge of the debtor, by taking the oath prescribed by law for

the relief of poor debtors committed on execution for debt. To maintain this defence, they produce the record of certain proceedings, under which the debtor was admitted by two magistrates to take said oath before the expiration of ninety days from his commitment. The plaintiff, on the other hand, contends that the discharge thus granted to the debtor was invalid, because it does not appear by the record, that the creditor was duly cited to attend at the time and place appointed for the examination of the debtor.

It is well settled by a series of decisions of this court, that in cases arising under the statutes for the relief of poor debtors, the jurisdiction of the magistrates, and their authority to administer the oath and grant a discharge to the debtor, depend upon a compliance with the preliminary requisites of the statute, in regard to the notice to the creditor and its due service on him. *Putnam v. Longley*, 11 Pick. 487; *Slasson v. Brown*, 20 Pick. 436; *Dunham v. Burlingame*, 2 Met. 271.

By the statute of 1844, c. 154, § 3, it is provided that the creditor shall be allowed, after the service of the citation upon him "in all cases, not less than twenty four hours, before the time appointed for the examination, also allowing time for his travel from the place of service to the place appointed for the examination, after being so notified, not less than at the rate of one day for every twenty four miles travel." In the case at bar, it is agreed that the creditor resided at South Boston, at which place the citation was served upon him, and that the distance thence to Salem, the place appointed for the examination, is fifteen miles. The time for the examination of the debtor was fixed on the 29th of September at nine o'clock in the forenoon, and the citation was served on the creditor, as appears by the officer's return, on the 27th of September; but it does not appear, either by the officer's return or otherwise, at what hour of the day on the 27th the service was made.

Upon this state of facts, the first question raised by the parties in this suit is, as to the true construction of the statute in regard to the time required for the service of the citation before the time fixed for the examination of the debtor. On the

part of the defendant it is contended, that twenty four hours' notice is sufficient, and that the time allowed for travel is not to be added to the twenty four hours prescribed in all cases, but is to be reckoned as running contemporaneously with them. It is scarcely necessary to say, that this construction is inconsistent with the language and intent of the statute. It is very clear, that the person notified, whether near or remote, is, in all cases, to have twenty four hours' notice before the time when his attendance is required; and, if it is necessary for him to travel to the place of attendance, he is to be allowed, in addition, for that purpose, not less than at the rate of one day for every twenty four miles' travel, or one hour for every mile to be travelled by him. If it were not so, a creditor having twenty four miles to travel would be entitled to no longer notice, than one who had no distance to travel. In this case, therefore, the plaintiff was entitled to fifteen hours' notice in addition to the twenty four, or thirty nine hours in all, of the time and place appointed for the examination. *City Bank at Providence v. Fullerton*, 11 Met. 73. By the provisions of the statute, the time and distance are measured by hours; and therefore fractions of a day are to be computed in ascertaining whether the requisite notice has been given.

As has been already stated, there was no evidence before the magistrates, nor is there any before this court, of the precise time which elapsed between the service of the citation and the time fixed for the examination. The only evidence on this point is the officer's return, by which nothing further appears than that the service was made on the 27th of September, the hour of service being omitted. It is doubtful whether any evidence would be admissible to show the exact time of service, except the officer's return. The act of 1844, c. 154, § 2, requires that the citation should be served and returned by an officer authorized to serve civil process. *Wellington v. Gale*, 13 Mass. 483, 488; *Leach v. Hill*, 3 Met. 173. The most proper method of showing the time of service, when it does not appear on the face of the original return, would be to have the return amended by the officer. In the present case, however, it does not appear by the return on the

Ridgway v. Bowman.

citation, nor in the agreed statement of facts, that the creditor was duly cited. The creditor being entitled to thirty nine hours' notice, a notice served on him on the 27th of September, to appear on the 29th at nine o'clock in the forenoon, might or might not be seasonable and sufficient according as it was served before or after a certain hour on the 27th. If before six in the afternoon of that day, it would be sufficient; if after that hour, it would be insufficient. To make the officer's return complete and satisfactory evidence in this case, therefore, of due notice to the creditor, it was as essential to state the hour as it was to name the day of the service, because both were necessary to show a timely service; and without such statement, it is left doubtful whether the creditor was duly cited. To give jurisdiction to the magistrates, and render the debtor's discharge by them valid, sufficient should be made to appear to show that the preliminary requisites of the statute have been complied with. As this does not appear in the present case, the defendants fail in their defence to this action, because they do not show a due discharge of the debtor. *Judgment for the plaintiff.*

JOHN W. RIDGWAY vs. FRANCIS BOWMAN.

A bill of sale, containing an inventory of the articles, and adding, "said property being subject to" certain mortgages specified, is a bill of sale of all the property in the inventory, although some of the articles are not covered by the mortgages; and cannot be controlled by parol evidence, that the words, describing the property as being subject to mortgage, were added for the purpose of limiting it to the mortgaged articles. And such bill of sale, when delivered to the vendee, with notice to the person in whose hands the property is, passes the title to all the property, although the vendor, at the time of such notice, delivers the mortgaged property only to the vendee, and declares that he delivers no other.

In an action to recover property included in a bill of sale purporting to be executed by the plaintiff to the defendant, an instruction given by the court to the jury, "that, if they should find that the parties had deliberately reduced their contract to writing by the bill of sale, and had therein specified the property in question in such terms as imported a legal conveyance of the same, and there was no uncertainty as to the subject matters intended to be conveyed, parol evidence of

Ridgway v. Bowman.

conversations between the parties should not be regarded by them to contradict or vary the written conveyance," is not open to exception, as leaving questions of law to the jury.

THIS was an action of trover, brought by the plaintiff, as assignee in insolvency of N. E. Nims & Company, and was tried in the court of common pleas before *Perkins, J.*, who signed the following bill of exceptions :

The evidence at the trial tended to prove, that the plaintiff was duly appointed assignee of Nims & Company, on the 19th of February, 1847; that the goods and chattels which were the subject of the action, were formerly the property of Nims & Company, and were, at the time of the alleged conversion, in the livery stable and riding school kept by them in Boston, and were duly demanded of the defendant by the plaintiff before the commencement of this action; that they were a part of the stock of the said livery stable and riding school; and that the whole stock, with the exception of the property in question, and the further exception of three horses, was subject to three mortgages previously made by Nims & Company: That, on the 24th of February, 1849, the plaintiff gave to the defendant an instrument purporting to be a bill of sale of the property in the livery stable and riding school, enumerating and specifying the several articles, and embracing the articles in question, under which bill of sale the defendant claimed title to the same; that, on the same day, after the execution of this instrument, the plaintiff went with the defendant to the said stable, for the purpose of making a delivery of the property purchased by the defendant; and then and there requested H. C. Nims, who had charge of the property, and who had been in the employment of Nims & Company, to produce some article of the mortgaged property, that he might deliver it to the defendant, and that said Nims pointed to a carriage which stood near them, and told them that was included in the mortgage; that the plaintiff then requested said Nims to witness that he delivered to the defendant the mortgaged property, and no other; that the defendant had since stated that he had purchased the mortgaged property, and no other; and that the consideration of said

Ridgway v. Bowman.

sale by the plaintiff to the defendant was \$150, and that the property in controversy was worth about \$450.

A counsellor at law, who was called as a witness by the plaintiff, testified that, on the 24th of February, 1849, the parties came to his office together, and produced an instrument, headed "Inventory of the property belonging to the firm of N. E. Nims & Co.," which paper was proved to be in the handwriting of one of said firm; and that he wrote before the words above mentioned the following: "Francis Bowman bought of J. W. Ridgway, assignee of the estate of N. E. Nims & Co.," and at the close of said instrument he wrote as follows: "Said property being subject to one mortgage for \$4,080 to Joseph Manning, Jr., one mortgage to Abel Cushing, Jr., for \$3,880.60, and one mortgage to S. G. Cheever for \$1,802.50; in all, \$9,716.63; said sum including interest on said mortgagees' demand. Boston, February 24, 1849." No evidence was offered to show that the plaintiff did not know the contents of the bill of sale. But the plaintiff offered to prove by this witness that he, (the plaintiff,) when said bill of sale was prepared, stated to the defendant that he thereby conveyed to him only the mortgaged property; and that the clause last above mentioned was intended by both parties, and was written by the witness, for the purpose of limiting and confining the bill of sale to the mortgaged property.

The presiding judge rejected the evidence as incompetent, and instructed the jury that, if they should find that the parties had deliberately reduced their contract of sale to writing, by the bill of sale, and had therein specified the property in question in such terms as imported a legal conveyance of the same, and there was no uncertainty as to the subject matter to be conveyed, or the extent of the engagement created by such conveyance, the bill of sale must be allowed to speak for itself, and parol evidence of previous conversations, or of conversations at the time when the instrument was completed, or afterwards, as to what was intended to be conveyed, or to show what was meant by the instrument, should not be regarded by them to contradict or vary the written conveyance.

The jury returned a verdict for the defendant, and the plaintiff excepted.

W. Hilliard, for the plaintiff.

H. Wellington, for the defendant.

SHAW, C. J. This is an action of trover for a portion of the stock of a livery stable and riding school, brought by the assignee of an insolvent firm. A large proportion of the stock, consisting of horses and carriages, was under mortgage; but the portion now in controversy, a few hundred dollars' worth, was not mortgaged. The case finds that the plaintiff gave the defendant an instrument, purporting to be a bill of sale of the property in the stable and riding school, enumerating and specifying the several articles, embracing those sued for in this action, under which bill of sale the defendant claims title to the same. In the afternoon of the same day, the parties went to the stable to make delivery; and the plaintiff, in making delivery, said that he delivered the mortgaged property, and no other, and no further explanation was made. The whole property is described and specified in an inventory, as conveyed, and is described as subject to three mortgages specified, with the amounts due thereon, including interest.

The plaintiff offered to prove by the counsellor at law, by whom the inventory was converted into a bill of sale, that when it was prepared, the plaintiff stated to the defendant, that he conveyed thereby to him only the mortgaged property; and that the last clause was intended by both parties, and was written by the witness, for the purpose of limiting and confining the bill of sale to the said mortgaged property. This evidence was rejected as incompetent and inadmissible. The court are of opinion that this evidence was rightly rejected, on the ground that it was an attempt to vary and control a written instrument by parol evidence. The case is quite distinguishable from that of *Blood v. Harrington*, 8 Pick. 552. Here, the instrument was offered and relied upon, as the contract of sale and proof of title; it was essential to the case, specified the terms of sale and the mortgages to which the property was subject. The offer of the evidence was an attempt to show, that a part of the articles, clearly

contained in the description of the property conveyed, were not intended to be conveyed—against the settled rule.

2. It is attempted to put it on the ground of latent ambiguity. We perceive no latent ambiguity. The sale was of the articles contained in the inventory of the property of the late firm of Nims & Company. In applying this description to the property, none other appeared, or was claimed, besides that comprehended in the description. It is very probable that there was a mistake, either in not knowing the condition of the property, or in reducing the contract to writing; but such mistake, if made, cannot be corrected by parol evidence.

3. It is then urged that the first description is controlled by the last clause, "being subject to mortgage;" but it cannot be so construed. These words are part of the description of the whole property. If the words had been, being the same contained in a specified mortgage, or any words of restriction to those mortgaged, it might have let in parol evidence to ascertain what would fall within the description. But it describes them all to be subject to certain mortgages, definitely described; and the obvious purpose seems to be, to give distinct notice of the amount of encumbrances upon the property conveyed.

4. The plaintiff then relies on the limited and qualified delivery, to restrict the operation of the contract of sale. This is another attempt to controvert a written contract, by matter resting solely in parol proof. But if it were good in law, it would not apply. No specific delivery of the property was necessary to give effect to the sale. The delivery of a bill of sale of property in the hands of a third person, with notice to such person, passes the property. But the delivery was coincident with the conveyance; the conveyance was of the whole property in the inventory, the whole being subject to certain mortgages; the delivery of the mortgaged property was equivalent to a delivery of the conveyed property, the whole being described as under mortgage. No distinction was then made; no statement that all the property in the stable and riding school was not mortgaged property.

5. The last exception is, that questions of law were left to

Howe v. City of Boston.

the jury. This seems to be a mere criticism on the words of the report, not well founded. The meaning is obvious. The terms are, "the court instructed the jury, that *if* they should find that the parties had deliberately reduced their contract to writing, and had therein specified the property in question in such terms as imported a legal conveyance of the same, and there was no uncertainty as to the subject matters intended to be conveyed," &c., then parol evidence of conversations between the parties should not be regarded, &c. . Perhaps, in strict grammatical terms, the whole, both law and fact, is put hypothetically; the meaning is, if the jury find that the paper was executed, which is a question of fact for their determination, then it imported a legal conveyance of the property, which parol evidence was inadmissible to contradict or vary — declaring the law. We think there is no ground for this exception.

Exceptions overruled.

CRANSTON HOWE *vs.* THE CITY OF BOSTON.

Where a person, who is liable to be taxed in a city or town for any real estate, is overtaxed by the assessors, whether the excess is caused by too high a valuation of real estate for which he is liable to be assessed, or by including in the valuation estates for which he is not liable, his only remedy is by application to the assessors for an abatement.

BIGELOW, J. The question of law, raised by the agreed statement of facts in this case, has been substantially determined by former decisions of this court. The plaintiff seeks to recover, in an action of assumpsit, a portion of the amount paid by him to the city of Boston, under protest and by compulsion, for taxes on real estate assessed to him for the year 1848. It appears that the plaintiff was a resident of the city in that year, and was legally assessed therein for personal estate and income, and also for a certain dwelling-house and parcel of land of which he was the owner. In addition thereto,

he was assessed for sixteen lots of land, situated at South Boston, which were the property of the United States. These lots he had agreed to purchase, and had paid an instalment of the purchase money, but no deed thereof had been given to the plaintiff on the 1st day of May, 1848, he not being entitled thereto until he had made further payments. The case, therefore, finds that a part of the tax on real estate assessed to the plaintiff, in the year 1848, was legally assessed to and paid by him. This action is brought to recover back so much of the tax assessed and paid by the plaintiff on real estate, as was assessed on said sixteen lots of land, on the ground that they were, on the 1st day of May, 1848, the property of the United States, and so, by law, exempt from taxation.

We consider the rule well settled in this Commonwealth, that where a party is rightfully taxed for any personal or any real estate, his remedy, and his only remedy for any excess of taxation, is by application for an abatement in conformity with the provisions of c. 7 of the revised statutes; whether the excess arises from including in the valuation property of which the person taxed is not the owner, and for which he is not liable to be assessed, or from placing an undue and disproportionate value on that of which he is the owner. In all such cases the assessment is valid, and the party aggrieved cannot maintain an action at law to recover back a portion of a tax so assessed, although paid by compulsion. But, on the other hand, if a person not legally liable to be taxed in a city or town, is nevertheless assessed there, then the assessment is regarded as wholly invalid, and, on payment by compulsion, the amount illegally assessed, that is, the entire tax, can be recovered in this form of action. *Little v. Greenleaf*, 7 Mass. 236; *Osborn v. Danvers*, 6 Pick. 98.

In the application of this rule, however, a distinction is recognized, founded on the essential difference in the mode of assessing and collecting taxes on real and personal estate. Personal estate follows the domicile, and is assessed to the owner in the place of his residence. Real estate is assessed in the town or city in which it is situated, to non-residents as well as residents. The former constitutes no lien on the pro-

erty; the latter creates one on the premises assessed for the amount assessed thereon. These differences in the mode of assessing and collecting taxes on personal and real property have caused each to be regarded in law as a separate and distinct class or subject of taxation, in relation to which the remedies of parties are entirely separate and distinct. *Preston v. Boston*, 12 Pick. 7.

But this distinction goes no farther than to allow the validity of an assessment, on each class or subject of taxation, to be determined by itself, irrespective of the other. The rules of law, by which the validity of a tax is tried, are the same as respects both; and, in order to render the whole tax invalid on either kind of property, so as to recover it back after payment by compulsion, it must be made to appear that the party aggrieved was not liable to assessment for any part of that class or subject of taxation of which he complains. The tax on the real estate, and that on the personal estate, each forms one integral and substantive amount or assessment, as between the tax-payer and the town or city, and cannot be invalidated and set aside in part only. It follows, therefore, that a party cannot be permitted to go behind the assessment, either on personal or on real estate, and look into the details and particulars of which the entire valuation is made up, and claim to recover back a portion of an entire assessment, on the ground that it included property of which he was not the owner, and for which he was not liable to assessment. *Osborn v. Danvers*, 6 Pick. 98; *Boston Water Power Co. v. Boston*, 9 Met. 199. Such was admitted to be the rule, as to personal estate, by the learned counsel for the plaintiff; but it was strongly urged in argument, that it did not apply to real estate. We can see no ground for this distinction; on the contrary, the reasons on which the rule is founded are equally applicable to both species of taxation. The error of the counsel has arisen from a misapplication of the principles recognized and acted on in the cases cited by him.

The case of *Preston v. Boston* has been already referred to, and only establishes the principle, that, having regard to the

Howe v. City of Boston.

essential differences in the mode of assessing and collecting taxes on personal and on real estate, the question of the legality of a tax upon each kind of property is to be determined irrespective of the others.

The case of *Hayden v. Foster*, 13 Pick. 492, upon which the plaintiff mainly relies, presented a different question from that now before the court. The question in that case was solely as to the extent of the lien created by statute on real estate for taxes, so far as it affected third parties, who had collateral, independent and derivative interests in property, which had been assessed to a common owner. There the attempt was to charge, under the lien created by statute, on one piece of real estate, in the possession of a mortgagee, the entire tax assessed on several pieces of real estate to the mortgagor, as a common owner of all. But the court held, that in such cases, in order to prevent inconvenience and confusion of rights, as well as great hardship and injustice, the statute lien did not extend beyond the amount of tax assessed on each separate parcel of real estate, and that the books of the assessors might be resorted to, to ascertain the precise valuation of each parcel, for which only it was liable to be sold in case of non-payment of the tax upon it. It is manifest that the decision in that case was grounded on the highest principles of equity, and justified by the necessity of affording to an innocent party the only remedy which the law could give him. Perhaps the language of the court, in regard to the assessment of separate parcels of real estate, is somewhat general, and, taken by itself, might give color to the argument pressed upon us by the counsel for the plaintiff; but taken in connection with the facts in that case, and the question actually before the court, it can have no legitimate application to the case at bar. There the question was not, as it is here, between the tax-payer and the city, but between a party claiming title under a sale for taxes made by the city, and another party, who held a title derived from the person who was legally assessed with the tax; and was not a question as to the illegality of a tax, or an over-valuation, but only as to the extent of the lien created by law.

No case has been cited, and none can be found, where it has been determined that one part of the same tax, whether on real or personal estate, laid for a lawful purpose, may be held legal, and another portion illegal and invalid; so that the latter can be recovered back in an action of assumpsit by the person who has been compelled to pay it. On the contrary, the recent case of *Boston Water Power Co. v. Boston*, 9 Met. 199, recognizes and reaffirms the true rule, and is decisive of the present case. That rule is, that the whole real estate in the same town or city constitutes, as between the tax-payer and the town or city, but one subject of taxation; and therefore, when the tax-payer has cause for complaint that his tax is too large, his only remedy is by application to the assessors for abatement; and, on their refusal, by an appeal to the mayor and aldermen, or county commissioners, in the manner prescribed by the statute. This being the rule, and it being admitted that a part of the tax on real estate was rightly assessed to the plaintiff, he cannot, in an action at law, go behind the assessment, and examine into the items and particulars of the tax for the purpose of invalidating and setting aside a part only. It is an entire tax, rightfully laid, and if excessive in amount, it is an over-valuation only.

Plaintiff nonsuit.

W. Brigham, for the plaintiff.

P. W. Chandler, city solicitor, for the defendant.

SAMUEL DOWNER & others vs. THE CITY OF BOSTON.

A by-law of the city of Boston, providing that the expense of constructing a common sewer, after deducting the portion to be paid by the city, shall be assessed upon the persons and estates deriving benefit therefrom, either by the entry of their particular drains thereon, or by any more remote means, apportioning the assessment according to the value of the lands thus benefited, independently of any buildings or improvements thereon, is valid. And it is no objection to the validity of an assessment, made pursuant to such by-law, that the greater part of one lot assessed is lower than the bottom of the sewer.

THIS was an appeal from the judgment of the court of
VOL. VII. 24

common pleas, upon a report and award of referees, under St. 1841, c. 115, § 4, assessing the charges of the construction of a main drain or common sewer in Second Street in South Boston.

The charges were originally assessed by the mayor and aldermen, pursuant to the city ordinance of March 7, 1844, [Ordinances of Boston of 1850, 358.] making it their duty in making assessments for defraying the expense of constructing or repairing common sewers, to deduct from the said expense such part, and not less than one quarter part, as they may deem expedient, to be charged to, and paid by the city; and to assess the remainder thereof upon the persons and estates deriving benefit from such common sewer, either by the entry of their particular drains therein, or by any more remote means; apportioning the assessment according to the value of the lands thus benefited, independently of any buildings or improvements thereon.

The referees appointed by the court of common pleas, awarded the same damages as the mayor and aldermen. Their report, on motion of the petitioners, was recommitted by that court, with instructions to report the facts in the case, and the principles on which their award was based, and particularly, whether, in making up their assessment, they considered the benefit to the petitioners, caused by the sewer, or adopted, as a basis of assessment, the valuation of the property.

Their subsequent report stated, that the lands of the petitioners bounded on Second Street, and extended back one hundred and thirty feet to First Street: That the superintendent of drains testified that he assessed upon the land-owners, benefited by the draining of their cellars or land, or who, by any more remote means, would receive any benefit from this drain, their proportional part of the charge of making the same; that he first obtained information at the assessors' office of the value and relative values of the lots of land thus benefited, and consulted one or more members of the committee of the city council on that subject, as to the depth of land to be assessed; that he assessed the petitioners for ninety feet in depth; that where a person owned sixty feet in depth

on the street, with no rights of drainage to rear owners, he assessed him for only sixty feet; that all vacant land running from street to street, he taxed one half; that on the upper side of Second Street, where the lots were smallest, he taxed sixty feet in depth; on the lower side, ninety feet; that he regarded only the value of the land, and paid no attention to the benefits derived from the drain; that he estimated the petitioners' land at 50 cents a foot, and shallower lots at 75 cents a foot; that there was no drainage, to his knowledge, from the petitioners' land to the common sewer; that the privilege of entering the main drain was a general benefit to all the estates bounding on the street under which it was laid, including the petitioners' land; and that he had devoted all his time to this business for eleven years, and had made all the assessments of a similar character since 1841, on the same principle.

The report also stated that it appeared in evidence, that the estate of the petitioners was now occupied by an oil factory; that the land descended gradually from Second Street to First Street, and that the level of the land, making the ground floor of the factory, was fourteen inches lower at the lowest part, than the bottom of the drain in question; all of the land beyond eighteen feet from the street, was somewhat lower than the bottom of the drain; and that the bottom of the cellar was seven feet lower; that the petitioners had not entered any drain into said main drain, but that a drain now ran from their land into the dock on the northerly side thereof; but their right to drain into said dock was disputed.

And the referees reported that, considering the relative values of all the land bounding on Second Street, and the position of the drain in relation to said lands, and the advantage to the estate of the petitioners, in having a common sewer, into which sinks and water from the upper stories, and from the front part of the basement or cellar story, could be carried, and the probable use that could be made of their land, the petitioners' estate was benefited by said drain in such proportion to the other lands on the street, that they ought to be assessed according to the previous award. And they de-

clined to determine sundry questions of law raised before them, being of opinion that they were appointed only for the purpose of settling and assessing the share to be charged to the petitioners, as designated by the order of the court appointing them.

One of the referees stated that he concurred in the report in all particulars, except in the statement of the principles on which the assessment was made; and as to that, he reported that the assessment, in his opinion, was made upon the valuation of the estate only, and not upon the principle that the estate received any benefit by draining their cellar or land.

Upon this report and award, judgment was rendered for the city, and the petitioners appealed to this court.

W. Brigham, for the petitioners.

P. W. Chandler, city solicitor, for the respondents.

SHAW, C. J. It appears to us that the order for the recommitment of the report of the referees was founded on a misapprehension. The court of common pleas seem to have supposed that the value of the estate could not be considered in the assessment; an impression probably caused by a misconception of the case of *Boston v. Shaw*, 1 Met. 130. The award had been already made, and the testimony upon which it was founded was not material; although, in point of fact, there had been no use of the drain by the petitioners. To explain the remark with regard to the misunderstanding of *Boston v. Shaw*, it is necessary to take into consideration the connection between the decision in that case, and the subsequent provisions of law upon the subject to which both relate. That case was decided in March, 1840, upon the ground, among others, that a portion of the by-law under which assessments were made on the defendant, was unreasonable and void. There was no longer any valid existing city ordinance upon the subject; and at the ensuing session of the legislature, the statute of 1841, c. 115, was enacted—apparently framed to avoid the objections to the old law—by which general authority was given to cities to construct drains, and assess the charge of their construction upon the persons benefited. And in pursuance of that statute, the city of Boston passed

the existing by-law, providing for assessments upon the persons and estates benefited by common sewers, either by entry of their particular drains therein, or by more remote means, according to the value of the lands benefited, independently of any buildings or improvements thereon.

The former ordinance was objected to as unjust and unreasonable, because the assessments under it were unequal in their operation. The owners of lots, which were built upon, were to be assessed in proportion to their value, including the buildings; the owners of vacant lots, in proportion only to the value of the lots, which might soon after be improved. The court said, "the apportionment should be made upon the value of the land, independently of the buildings." They also said that "it must be considered as reasonable, that the charge should fall upon the lots abutting, which would have the privilege of entering particular drains from the respective lots into the main drain." And where the statute and ordinance subsequently speak of remote benefit, they mean the increased value given to vacant and unimproved lots by this privilege of letting in drains from them in case buildings should be so erected. An assessment upon the proprietors of land, so situated that it is or may be benefited by the sewer, is just and equal. There is an actual benefit to the land, since its value is increased for sale or improvement; and although it may be vacant territory, upon which the proprietors have not built, yet it is designed for building; and the advantage accruing is a proper ground for assessment, whether upon lots occupied by houses, or designed for houses. It is like the case of sidewalks, where an assessment is levied for a common benefit, present or future, existing actually, or in expectation. And the party should be charged, although he never actually uses the drain; perhaps not, indeed, if there be no prospect of the possibility of benefit. These we understand to have been the grounds of the statute and ordinance, and we are unable to see any valid objections to them. We do not understand that the value of the lots was to be excluded; but that the value of the buildings on them, or of any improvement made by the owner or others was not to be considered.

 Balch & wife v. Shaw.

It is urged, in the present case, that the petitioners could never have occasion to use this drain. But the streets were one hundred and thirty feet from each other; and although it might for the present be convenient to drain from one lot upon the other, yet there was a probability that the time might come when it would be convenient to use the main drain. The lots might be graded, and they would then derive as much advantage as others from the city sewer. The majority of the referees fixed the assessment according to the benefit resulting from the sewer. The other did not dissent from them, but stated what he thought the basis of their apportionment. We think the majority right, and that it was proper to consider the benefit which might result from draining. There is nothing to show that they considered any other benefit, and their course was right and conformable to the statute, which looks not only to a present power of use, but to a benefit from future use.

Judgment affirmed.

BENJAMIN L. BALCH & Wife *vs.* ROBERT G. SHAW.

Courts of record have power, at any time, as well after, as during the term, at which any entry is made, of their own motion or on the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case; and are the exclusive judges of the necessity and propriety of so amending and extending their records, and of the proofs and of the sufficiency of the proofs on which to proceed.

THIS was a writ of entry, dated the 25th of August, 1849, in which the demandants claimed title in right of the wife as heir of John Tilley. The trial was in this court, before Fletcher, J., from whose report the following facts appeared:

The tenant, to make out his title, produced a record of the court of common pleas for this county, from which it appeared, that at the October term of that court, 1824, the executors of John Tilley were empowered to sell and pass deeds

to convey certain real estate of their testator, including the demanded premises, and also a certain wharf estate, for the payment of his debts and charges of administration. And the tenant proved that, pursuant to this license, the demanded premises were duly sold at auction and conveyed by said executors, on the third of November, 1824, to Charles Jones, who, on the 24th of April, 1845, conveyed the same to the tenant.

The demandants thereupon offered evidence of proceedings had upon the petition of one Nathaniel Vinal at the January term of the court of common pleas, 1838, and an order passed that the clerk make up the record of the order passed at the October term, 1824, and enter the same at large, according to the minutes in the dockets and the proceedings on file, among the records of October term, 1824; and also proved, that Vinal was interested as owner of part of the wharf estate, named in the order passed at the October Term, 1824, but never had any interest in the premises demanded in this action. The demandants objected to the proceedings in the court of common pleas, because the record of the order passed at the October term, 1824, was not made up and entered at large until 1838; that if the court had power to order the clerk to make up the record, there was not sufficient matter of record from which to make it up; that there was a want of judicial action upon the petition of John Tilley's executors; that the clerk of the court in 1838 was not the proper person to make up the record, but the clerk in 1824; that Vinal was not the proper person to petition the court to order such record to be made up; that no notice was ordered upon the petition of Vinal; and that some of the matters set forth in Vinal's petition were not true.

There being no question of fact in dispute, it was agreed that the case should be taken from the jury and reported to the full court; and that if the court should be of opinion that there was a sufficient record of the order of the court of common pleas, made at the October term, 1824, to sell the demanded premises, judgment should be rendered for the tenants; otherwise such judgment as the court might direct.

Balch & wife v. Shaw.

L. Gale, for the demandants.

E. Blake, for the tenant.

FLETCHER, J. This is a writ of entry. The demandants claim in right of the wife as heir of John Tilley. The tenant claims under a sale by the executors of John Tilley, by virtue of a license of the court of common pleas. To make out his title, the tenant produced a record of the court of common pleas. The case turns, therefore, upon the question whether the record was rightfully amended, so that the tenant can maintain his title on that record.

There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*. The length of time in this case, between granting the license and making up the record, does not take away the right or jurisdiction of the court. The authorities upon this point are numerous and conclusive.* This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record; in such case, the defect is not in the record, but in the action of the court.

It was further said in argument, that there was not sufficient material from which to make up the record. But the court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive, until altered or set aside by the same or some other court having jurisdiction, but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title.

It was further said, that the extended record was invalid, because made without notice. But this was not a case for

* See *Usher v. Dansey*, 4 M. & S. 94; *Atkins v. Sawyer*, 1 Pick. 351; *Tilden v. Johnson*, 6 Cush. 354; *Hall v. Williams*, 1 Fairf. 278, 288; *Close v. Gillespie*, 3 Johns. 526; *Waldo v. Spencer*, 4 Conn. 71.

Sims's Case.

notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party, who supposes he can show such cause, should apply to the court to have the record set aside or expunged, after it is made.

Then as to the objection that the record was extended upon the application of Vinal, who was not interested in the premises demanded in this suit. If he had an interest in the demanded premises, or if he had no interest, it would not be material. The court might amend their records upon their own motion, or upon the motion or suggestion of any one interested. It is not a proceeding in which there need be any parties. It is the act of the court itself, correcting its own records, to make them conform to the truth of the case.

These general views will render it unnecessary to consider particularly some other ingenious arguments which were offered by the counsel for the demandant. The court being of opinion that there was a sufficient record of the order of the court of common pleas to sell the premises conveyed to Jones, there must be

Judgment for the tenant.

 THOMAS SIMS'S CASE.

When it appears, from a petition for a writ of *habeas corpus*, that the petitioner, if brought before the court, would not be entitled to a discharge, the writ will not be issued.

How far it is competent for one court, by a writ of *habeas corpus* to the executive officer of another court, to take a prisoner from the custody of the latter, *quære*.

Congress has power, under the constitution of the United States, to pass laws for the reclamation of fugitive slaves.

The act of congress of 1850, c. 60, concerning fugitives from service, being substantially like the act of congress of 1793, c. 7, the constitutionality of which has been settled by the decisions of the courts of the United States, must be deemed constitutional by this court. The authority which it confers on commissioners of the circuit courts, and its making no provision for a trial by jury, do not make it unconstitutional.

THIS was a petition for a writ of *habeas corpus*. S. E. Sewall, on the 4th of April, 1851, presented to this court the

Sims's Case.

petition of Thomas Sims, describing himself as of Boston, and representing that he was imprisoned at the court house in Boston, by Charles Devens, of said Boston, Esquire; that Devens pretended that the petitioner was a fugitive slave, and imprisoned him on that ground, and pretended to hold him by virtue of a warrant, a copy* of which, and of the return of the officer thereon, was annexed to the petition; that Devens was the marshal of the United States for the district of Massachusetts, and that Frederick D. Byrnes, whose name was subscribed to said copy, was one of his deputies, and in executing the warrant, acted under his authority and direc-

* This copy was in the following words:

"United States of America, Massachusetts District, ss.

"[SEAL.] To the marshal of our District of Massachusetts, or to either of his Deputies, Greeting:

"In the name of the President of the United States of America, you are hereby commanded forthwith to apprehend Thomas Sims, now alleged to be in your district, a colored person, charged with being a fugitive from labor, and with having escaped from service in the State of Georgia, (if he may be found in your precinct,) and have him forthwith before me, one of the commissioners of the Circuit Court of the United States for the said district, at the court house in Boston, in the said district, then and there to answer to the complaint of John B. Bacon, of the city of Savannah, in the state of Georgia, agent and attorney of James Potter, of the county of Chatham, in the state aforesaid, alleging under oath that the said Thomas Sims owes service or labor to the said Potter, in the state of Georgia, and while held to service there, under the laws of the said state of Georgia, escaped into the state of Massachusetts aforesaid, and praying for the restoration of the said Thomas Sims to the said Potter, and then and there, before me, to be dealt with according to law. Hereof fail not, and make due return of this writ, with your doings thereon before me. Witness my hand and seal, at Boston aforesaid, this third day of April, in the year one thousand eight hundred and fifty one.

"GEO. T. CURTIS,

*"Commissioner of the Circuit Court of the United States
for the Massachusetts District."*

"United States of America, Massachusetts District, ss.

"Boston, April 3, 1851.

"Pursuant hereunto, I have arrested the within named Thomas Sims, and now have him before the commissioner within named for examination.

"A true copy.

FREDERICK D. BYRNES,

"Attest,

U. S. Deputy Marshal.

"FREDERICK D. BYRNES,

"U. S. Deputy Marshal."

tion. Wherefore, the petitioner prayed this court to issue a writ of *habeas corpus*, to have him brought before them and discharged from his imprisonment. And the petitioner further said that he was free, and not a slave. The petition was signed with the petitioner's mark, and sworn to by him.

Sewall spoke briefly in favor of issuing a writ of *habeas corpus*. But the court refused to grant the writ, on the ground that no sufficient cause for granting it was shown in the petition.

On the 7th of April, *R. Rantoul, Jr.* and *R. H. Dana, Jr.* presented a similar petition.

R. H. Dana, Jr., for the petitioner, referred to Rev. Stats. c. 111, §§ 1, 2, and contended that, as it appeared from the petition that this case was not within either of the exceptions enumerated in § 2, the petitioner was entitled to the writ as of right, and to have the unlawfulness of his imprisonment tried upon the return. But the court directed the whole case to be argued now.

R. Rantoul, Jr., for the petitioner. 1. The power which the commissioner is called upon in this proceeding to exercise is a judicial power, and one which, if otherwise lawful, can be exercised only by a judge of the United States, duly appointed; and the commissioner is not such a judge. He has therefore no jurisdiction of this case, and this court should order the petitioner to be discharged. Opinion of Tilghman, C. J., *Commonwealth v. Smith*, 5 American Register, 168, 171.

The constitution of the United States provides, in art. 3, § 1, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." The power here given is the whole judicial power of the United States; and congress has no authority to confer any portion of judicial power on any other persons. *Martin v. Hunter*, 1 Wheat. 304, 327, 330.

A commissioner is not a judge within the meaning of the constitution, for he is not appointed to hold his office during good behavior, but at the pleasure of the circuit court of the United States; and he does not receive a compensation for his services at stated times, but is paid by fees, the amount of which depends on his decision—being ten dollars if he decides for the claimant, and five if he does not. Act of 1850, c. 60, § 8. The commissioner cannot, therefore, exercise judicial power.

Now, are the duties of the commissioner, under this act, an exercise of judicial power? The constitution of the United States, in art. 3, § 2, provides that “the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority. See, on the construction of this clause, *Cohens v. Virginia*, 6 Wheat. 264, 379, 407; *Parsons v. Bedford*, 3 Pet. 433, 446. The proceedings, provided for by the act of 1850, of themselves constitute a case within the meaning of this clause. Any proceeding whereby a party invokes the aid of any tribunal to render him any right, which he demands, and which is denied or withheld from him, constitutes a case. “Where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case ‘arising under the constitution’ of the United States, within the express delegation of judicial power given by that instrument.” By Story, J., delivering the opinion of the supreme court of the United States, in *Prigg v. Pennsylvania*, 16 Pet. 539, 616.

The act of 1850, c. 60, § 6, calls this proceeding “a case,” and directs the commissioner to “hear and determine” it; and his certificate, when granted, is conclusive, and the claimant can take away the captive wherever he pleases. And § 4 gives the commissioner concurrent jurisdiction with the

judges of the circuit and district courts of the United States. Attorney General Crittenden, in his opinion, given to the president on the constitutionality of this law in another respect, says, that § 6 "provides that those officers, and each of them, shall have *judicial power* and jurisdiction to hear, examine and decide *the case*." [5 Opinions of Att. Gen. of U. S. 255.]

The decision of the commissioner is conclusive of the fact, that the person claimed owes service to the claimant. As Attorney General Crittenden says, "Congress has constituted a tribunal, with exclusive jurisdiction to determine summarily, and without appeal, who are fugitives from service or labor, and to whom such service or labor is due." [5 Opinions of Att. Gen. of U. S. 258.]

If this be not so; if the commissioner be not required to decide this question, but only whether the alleged fugitive shall be taken back to the state from which he is alleged to have fled, the act is yet more grossly unconstitutional; for art. 4, § 2, of the constitution only authorizes a "person *held to service or labor*" to be delivered up; not one merely *charged*, or *claimed*. By contrasting this with the preceding paragraph, concerning fugitives from justice, the difference between the two cases appears clearly. That paragraph provides, that "a person *charged* in any state with treason, felony or other crime, who shall flee from justice," shall be delivered up; and the reason is, that he may be tried by a jury of the vicinage in which the crime is said to have been committed. A *prima facie* case is all that is required in the case of a fugitive from justice. But it is not all in the case of an alleged fugitive from service, who is the inhabitant of a free state. He is here presumed to be free. Declaration of Rights, art. 1. And the constitution of the United States does not allow him to be given up, to be carried thousands of miles from his home and friends, to be tried, if tried at all, in a state where all the presumptions of law and fact are against him on account of his color; and with no security that he will be able to obtain a trial.

If the act requires that the alleged fugitive from service shall be sent back, without finding out whether or not he be

actually *held* to service under the laws of another state, the act is unconstitutional, because there is no power given to congress by the constitution to pass such an act. Congress, if it has any power in the premises, can only pass an act declaring that the person *held* shall be delivered up. If congress undertakes to do more, its acts are void. On the other hand, if it is first to be ascertained whether or not the party claimed be really held to service, then the decision of the commissioner is final on this question; his decree is the last act of judicial power, which power the commissioner has no authority, under the constitution, to exercise, not having the unchangeable salary or the permanent tenure of office, without which no man can constitutionally be made a judge.

2. Congress has no power, under the constitution of the United States, to legislate at all on the subject of fugitive slaves. The government of the United States is a government of limited powers. It has no powers that are not expressly delegated to it by the constitution. The powers not expressly delegated to it, are reserved to the states respectively, or to the people. Const. of U. S. Amendments, art. 10; Declaration of Rights, art. 4. The force of this argument, as applied to the subject of fugitive slaves, will better appear by an examination of the previous clauses of the fourth article of the constitution.

The first section of that article provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." These words, of themselves, only declare what shall be done; they are no grant of power to congress; and, therefore, the framers of the constitution added: "And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The first paragraph of the second section of the same article declares that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." This is a direction to the states, and to no one else. There is no power given to congress to act, as there is in the first section; and congress has never acted on any such supposed power.

Sims's Case.

Then comes the second paragraph: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This clause does not necessarily imply that it must be executed by congress; for it can be executed by the states. The duty enjoined by it is now performed by the states, though regulated by a federal law. But a state might make regulations on the subject, as well as congress. And the constitution declares, that what is not expressly delegated to the general government is reserved. Therefore congress has no power to legislate on the subject of fugitives from justice.

But the objection is still stronger, as applied to the third paragraph, which is the one now in question. So far from any power being granted to congress, direct reference is made to the states. "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." The prohibition, in its form, as well as from its nature, is directed to the states only; and so is the command to deliver up. This clause stands precisely as the first section would have stood, if no power had been expressly granted therein to congress.

The opinion of the court was delivered on the afternoon of the same day by

SHAW, C. J. This is a petition for a writ of *habeas corpus* to bring the petitioner before this court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge, on the return of the writ. This we declined to do, on grounds of principle, and common and well settled practice. Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient

ground *prima facie* for his discharge, the court will not issue the writ. And on a slight recurrence to the cases, we are of opinion that this is the established rule and practice at common law. Indeed the ordinary course is, for the court applied to, to grant a rule *nisi* in the first instance to show cause why the writ should not issue. Of course, if sufficient cause is shown, it will be withheld. *Blake's case*, 2 M. & S. 428; *The King v. Marsh*, 3 Bulst. 27. And in *Hobhouse's case*, 3 B. & Ald. 420, the question came before the court and was fully discussed. It was there considered that, whether the writ of *habeas corpus* were claimed at common law or under the statute, a proper ground ought to be laid before the court, previously to granting the writ. It is not granted as a matter of course; and the court will not grant the writ of *habeas corpus* when they see that, in the result, they must remand the party. The court in that case, which was a commitment by the house of commons, had granted the writ, in the first instance, upon an urgent claim that it was a matter of right, and some colorable authority cited in support of it, and on its return stated the reasons why it should not have been done.

We think that the same rule and practice have prevailed in this country. In *Watkins's case*, 3 Pet. 201, Marshall, C. J., said, "the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded." Indeed, by necessary implication, it is the fair result of the provisions of the *habeas corpus* act of this commonwealth. The Rev. Sts. c. 111, § 3, require, in all cases of an application for the writ of *habeas corpus*, that the party imprisoned, or some person in his behalf, shall present a petition, and if held under legal process, or color or pretence of legal process, shall annex a copy of the process, under which the respondent claims to hold and detain him, or make proof by affidavit, that a copy of such a writ or warrant has been applied for, and refused. But why annex a copy of the process, unless it be to enable the court to form an opinion whether the party is rightly held in custody or not; and why form an opinion in that stage of the proceeding, if it is to constitute no ground for judicial action? It is urged that this is a writ of right, and therefore grantable without inquiry. But it

is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, and the party claiming it might go to the clerk and sue it out, as he may a writ on a claim for land or money. It is a writ of right in a larger and more liberal sense; a right to be delivered from all unlawful imprisonment. Nor does this limit or restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently, on the return of the writ, or partly on the one, and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law. It was upon these grounds, that we stated on the presentation of a similar petition, that no sufficient cause appeared upon the petition for granting a writ; and upon further consideration we now repeat, that when it appears on the party's own showing in the petition, that if brought before the court, he would not be entitled to a discharge, the court will not issue the writ.

We are then to examine the petition, accompanied as it is, by a copy of the warrant under which the marshal of the district claims to hold the petitioner, and the return thereon. It appears that the petitioner has been arrested and is claimed as a fugitive from labor, upon a warrant, issued by George T. Curtis, Esquire, a commissioner of the circuit court of the United States, in pursuance of a law of the United States, and that the deputy marshal has returned the warrant to the commissioner who issued it, and has the body of the petitioner before the commissioner for the purposes expressed in the warrant.

An obvious question occurs here, namely, how far it is competent for this court, by a writ of *habeas corpus* to the marshal, to take a prisoner from the custody of another tribunal, court or magistrate, of which the marshal is the executive officer, and after the prisoner has, by the execution and return of the warrant, been placed under the control and direction of such court or magistrate, to be held, discharged, brought in, or

Sims's Case.

remanded. This point has not been noticed in the argument, and is not, perhaps of much importance; and perhaps it might be avoided by an amendment of the petition. But we have thought it worthy of a passing remark, as one of those considerations which presented themselves to our minds after a similar petition had been submitted on a former occasion, indicating that apparently, and on the face of the proceedings, the petitioner was in regular and lawful custody.

It is now argued, that the whole proceeding, as it appears upon the warrant and return, is unconstitutional and void; because, although the act of congress of 1850, c. 60, (9 U. S. Stat. at Large, 462,) has provided for, and directed this course of proceeding, yet that the statute itself is void, because congress had no power, by the constitution of the United States, to pass such a law, and confer such an authority. The ground of argument leading to this conclusion is, that it is not competent for congress, under the power of legislation vested in them by the constitution, to confer any authority, in its nature judicial, upon any persons, magistrates or boards, other than organized courts of justice, held by judges, appointed as such, and to hold their offices during good behavior, and paid by fixed salaries; whereas the commissioners, designated by the law in question, do not hold their offices during good behavior, nor are they paid by fixed salaries. This is the argument.

We are called on to consider two questions: First, whether congress has authority to pass any law on the subject; and second, whether the law actually passed did, in any respect, of which the petitioner had a right to complain, violate the provisions of the constitution. These are grave questions, and it is impossible to approach them without a deep sense of the responsibility which must rest on a judicial tribunal, when called upon to deliberate upon the constitutionality of any legal enactment adopted by the highest legislative body of the union, and passed under all the forms required to give it the sanction of law.

The subject matter of this act is the return and restoration of fugitive slaves, designated in the constitution as persons held to service or labor in one state under the laws thereof.

escaping into another. The whole provision, art. 4, § 2, is as follows: "No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

In order to a just understanding and exposition of this provision of the constitution, and the laws made under it, it is necessary to refer briefly to the circumstances under which the constitution was made, and the great social and political objects and purposes, which the people of the United States had in view, in adopting it. The constitution of the United States is not to be expounded as if it were now opened for the first time, and with a sole regard to the words and figures in which it is expressed; its history is too deeply interwoven with our whole social system, to be disregarded, when we are called upon to ascertain its full meaning and effect.

These North American provinces, when they became independent of the government of Great Britain, regarded themselves, and were regarded, as sovereign states; the articles of confederation were considered rather as a compact amongst independent states, than as a government. While pressed by the force of a common external hostility, by which England attempted to subdue them to obedience, a sense of common danger and common interest, and the necessity of acting together in their common defence, compelled them to act together with a good degree of harmony and union; but this could last only while this external pressure continued. When it terminated, what was the condition of these independent communities? That of sovereign states, varying greatly in regard to extent of territory, numbers and strength, with the usual powers incident to sovereign states, of declaring war and peace, making treaties, and exercising an exclusive control and jurisdiction over all persons and subjects within their respective territories. These would have been their rights and powers, had no union been formed.

In some of the states, large numbers of slaves were held; in others a few only; but some, it is believed, in all, except

Massachusetts, in which slavery was considered as abolished, by the Declaration of Rights, adopted as part of the constitution of 1780. Had no union been formed, the states would have been left to assert and defend their rights against each other by war only. If two states bordered on each other, one a slave state and the other a free state, there would of course be a constant effort of slaves to escape into the free state, and a constant temptation to slave owners to follow and recapture them, which must be done by force, unless sanctioned by treaty. Such acts on both sides must be regarded by each as violations of the exclusive territorial rights of the other, and a justifiable cause of war. There would naturally be a constant border war, leading either to interminable hostility, or to the subjugation of one by the other. This state of things could only be avoided by a treaty, by which one party should stipulate not to permit its own territory to be used as an asylum for fugitive slaves escaping from the other, and the other party should engage to restrain its own subjects from making hostile incursions into the territory of the other. It would be in vain for the government of the free state to insist that they would enter into no such compact, because slavery is wrong and unjust; each sovereign power has a right, by the recognized law of nations, to decide for itself, upon its own internal condition and regulations, within its own territory. This principle has been acknowledged by all nations, even those to whose policy, laws and institutions, slavery is most obnoxious. If the refusal to enter into such treaty could have abolished slavery in a slave state, it might have been a motive with a free state to refuse. But it is manifest that it would not, except by war and conquest, depending not upon a principle of right, justice or policy, but upon the preponderance of physical force.

The evils existing immediately before the adoption of the constitution, and the greater and more appalling evils in prospect, indicated the absolute necessity of forming a more perfect union, in order to secure the peace and prosperity of all the states. This could only be done by the several states renouncing and relinquishing a portion of their powers of sove-

reignty ; and these were the right of war and peace, the right of making treaties with foreign powers and with each other, and the right of exercising absolute power and dominion over all persons and things within their own territories respectively. In order to form this more perfect union, delegates from the several states met together. It was obvious that the renunciation of some of the powers of sovereignty, at least to the extent above mentioned, was the first step to be taken, and was absolutely essential to the success of any scheme of union. Still, it could not but be perceived that the great difference in the condition of the states in regard to the institution of slavery, and the prospect that many of the states would soon become free, from causes then in operation, constituted a difference in their relative condition, which must first be provided for. So long as the states remained sovereign, they could assert their rights in regard to fugitive slaves by war or treaty, and, therefore, before renouncing and surrendering such sovereignty, some substitute, in the nature of a treaty or compact, must necessarily be devised and agreed to. The clause above cited from the constitution seems to have been, in character, precisely such a treaty. It was a solemn compact, entered into by the delegates of states then sovereign and independent, and free to remain so, on great deliberation, and on the highest considerations of justice and policy, and reciprocal benefit, and in order to secure the peace and prosperity of all the states. It carries with it, therefore, all the sanction which can belong to it, either as an international or a social compact, made by parties invested with full powers to deliberate and act ; or as a fundamental law, agreed on as the basis of a government, irrevocable, and to be changed only by the power that made it, in the form prescribed by it.

Such being the circumstances, under which this provision of the constitution was adopted ; such the relations of the several states to each other ; such the manifest object which the framers of the constitution had in view ; we are to look at the clause in question, to ascertain its true meaning and effect. We think it was intended to guaranty to the owner of a slave, living within the territory of a state in which slavery is

permitted, the rights conferred upon such owner, by the laws of such state; and that no state should make its own territory an asylum and sanctuary for fugitive slaves, by any law or regulation, by which a slave, who had escaped from a state where he owed labor or service into such state or territory, should avoid being reclaimed; it was designed also to provide a practicable and peaceable mode, by which such fugitive, upon the claim of the person to whom such labor or service should be due, might be delivered up.

But the right, thus secured by the constitution to the slave owner, is limited by it, and cannot be extended, by implication or construction, a line beyond the precise *casus fœderis*. The fugitive must not only owe service or labor in another state, but he must have *escaped* from it. This is the extent of the right of the master. It is founded in the compact, and limited by the compact. It has therefore been held, that if a slave is brought into this state by his master, or comes here in the course of his occupation or employment without having *escaped*, he is not within the case provided for by the constitution. *Commonwealth v. Aves*, 18 Pick. 193. This results not so much from the voluntary act of the master in bringing or permitting the slave to be brought within the limits of a free state, as because the law by which the person is held to slavery in his own state is local, and has no extraterritorial operation, and because he is not within the provision of the constitution, under which he may be lawfully removed, not having escaped.

Upon the same principle it was held, on the return of a writ of *habeas corpus* before me in vacation, that a person who was a slave in Virginia, belonging to an officer of the navy, and who had been taken out by such officer by the special permission of the secretary of the navy, and where the ship had been ordered to Boston on her return from a cruise, and the crew to be discharged there, could not be taken back to Virginia by force and against his will; because the master had no power to imprison him within the limits of this state, or remove him by force from them, under his general authority as an owner by the law of Virginia; and that he was not liable

to be claimed as a fugitive, under the provision of the constitution, because he had not *escaped*. *Commonwealth v. Fitzgerald*, 7 Law Reporter, 379.

To the extent, however, to which this privilege or benefit goes, that of securing the return of persons, owing service or labor in one state, who have fled and escaped into another, this provision of the constitution must be regarded as complete and sufficient to the proposed right. But the constitution itself did not profess or propose to direct, in detail, how the rights, privileges, benefits and immunities, intended to be declared and secured by it, should be practically carried into effect; this was left to be done by laws to be passed by the legislature, and applied by the judiciary, for the establishment of which full provision was at the same time made. The constitution contemplated a division and distribution of the powers incident to a sovereign state, between the general government of the United States, and the government of each particular state; a distribution, not depending on local limits, but made by selecting certain subjects of common interest, and placing them under the entire and exclusive jurisdiction of the general government; such, for instance, as the foreign relations of the country, the subjects of war and peace, treaties, the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes. These are a few of the most prominent subjects, by way of illustration. And the theory of the general government is, that these subjects, in their full extent and entire details, being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the state, and the jurisdiction of the general government therefore becomes exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject matter. This is not left to mere implication. It is expressly declared, in art. 1, § 8, that congress shall have power to make all laws which shall be necessary and proper, for carrying into execution all the powers vested by the constitution in the government of the United States, or

Stim's Case.

in any department or officer thereof. And by art. 6, "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." All such laws made by the general government, upon the rights, duties and subjects, specially enumerated and confided to their jurisdiction, are necessarily exclusive and supreme, as well by express provision, as by necessary implication. And the general government is provided with its executive, legislative and judicial departments, not only to make laws regulating the rights, duties and subjects thus confided to them, but to administer right and justice respecting them in a regular course of judicature, and cause them to be carried into full execution, by its own powers, without dependence upon state authority, and without any let or restraint imposed by it.

It was, as we believe, under this view of the right of regaining specifically the custody of one from whom service or labor is due by the laws of one state, and who has escaped into another, and under this view of the powers of the general government, and the duty of congress, that the law of February 12, 1793, was passed. Act of 1793, c. 7, (1 U. S. Stat. at Large, 302.) It was passed at the second congress, so soon after the adoption of the constitution, that many of the members may be well presumed to have been members of the convention, and all of them to have been intimately conversant with the great principles of the constitution, and with the views, intentions, and purposes of its framers. This species of contemporaneous construction has ever been regarded as of great weight and importance, and is entitled to the highest respect. It bears with a great weight of authority upon two points; first, as to the power and duty of congress to pass laws to secure and carry into effect a right confirmed by the constitution of the United States; and secondly, as to the fitness of the provisions of law thereby adopted, and their adaptation to the proper and practical assertion of the right secured by the constitution.

The act of 1793, made for the purpose of providing and declaring the manner in which the claim shall be made for the fugitive from service, who has escaped, is substantially as follows: That when any person held to labor in any of the United States, or in either of the territories, under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labor may be due, his agent or attorney, is empowered to seize or arrest such fugitive, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made; and upon proof, to the satisfaction of such judge or magistrate, that the person so seized doth, under the laws of the state or territory from which he fled, owe service to the person thus claiming him, it shall be the duty of such judge or magistrate to give a certificate to the claimant, which shall be a sufficient warrant for removing the fugitive to the state or territory from which he fled.

The manifest intent of this act of congress was, to regulate and give effect to the right given by the constitution. It secured to the claimant the aid and assistance of certain magistrates and officers, to enable him to exercise his right in a more regular and orderly manner, and without being chargeable with a breach of the peace. It obviously contemplated a prompt and summary proceeding, adapted to the exigency of the occasion, in aid of a power, in terms conferred by the constitution on the claimant. It vested the power of inquiry, (whether regarded as judicial or otherwise,) the same power which is now drawn in question, in magistrates of counties, cities or towns corporate. As to the mode of trial contemplated by this act, it is described by Mr. Justice McLean, in his opinion in *Prigg v. Pennsylvania*, 16 Peters, 539, 667, in these terms: "Both the constitution and the act of 1793 require the fugitive from labor to be delivered up on claim being made by the party, or his agent, to whom the service is due. Not that a suit should be regularly instituted. The proceeding authorized by the law is summary and informal.

The fugitive is seized and taken before a judge or magistrate within the state, and on proof, parol or written, that he owes labor to the claimant, it is made the duty of the judge or magistrate to give the certificate, which authorizes the removal of the fugitive to the state from whence he absconded."

A historical fact is mentioned by the same learned judge, (p. 660,) which may throw some light not only on the introduction of the constitutional provision, but on the form of the law intended to carry it into effect. "At an early period," says he, "of our history, slavery existed in all the colonies; and fugitives from labor were claimed and delivered up under a spirit of comity or conventional law among the colonies." If such was the practice when the colonies were independent of each other in their municipal laws or regulations, and even after a partial union by the articles of confederation, which made no provision on the subject, may it not be reasonably conjectured, that this claim to custody of the person of the alleged slave, when there was no positive law to regulate it, was enforced through the medium of colonial magistrates, exercising analogous powers in similar cases, and may not this have suggested the method provided for in the act of 1793?

By the act of 1793, the authority of issuing a warrant to arrest a fugitive from labor, of inquiring into the fact both of owing labor and of having escaped, and of granting a certificate, is conferred on justices of the peace, appointed for a term of years, and without salary, by the state government, or on the magistrates of cities and towns corporate. It is very manifest, therefore, that these powers were not deemed judicial by the congress of 1793, in the sense in which it is now insisted that the commissioner, before whom the petitioner has been brought, is in the exercise of judicial powers not warranted by the constitution, because not commissioned as a judge, nor holding his office during good behavior. Indeed, it is difficult, by general terms, to draw a precise line of distinction between judicial powers and those not judicial. It is easy to designate the broad line, but not easy to mark the minute shades of difference between them. Those officers who hold courts, and have civil and criminal jurisdiction,

Sims's Case.

beyond doubt, exercise judicial powers. But there are, under every government, functions to be exercised, partly judicial and partly administrative, which yet require skill and experience, judgment, and even legal and judicial discrimination, which it is more difficult to classify. So under our own government, in the constitution of which a similar provision is found, requiring all judicial officers, excepting justices of the peace, to be commissioned and hold their offices during good behavior, we find many such cases. Such are bank commissioners, county commissioners, sheriffs, when presiding over and instructing juries impanelled to assess road damages and damages for flowing land; commissioners of insolvency on the estates of deceased persons and of living insolvent debtors, masters in chancery, and many others.

Now so far as we understand it, commissioners of the circuit court of the United States are officers exercising functions very similar to those of justices of the peace under the laws of the commonwealth. They are commonly appointed from among counsellors at law, of some standing and well reputed for professional skill and experience. Their duty is to inquire into violations of the laws of the United States, to hear complaints, issue warrants, hold examinations, and bind over or commit persons for trial for offences. These are functions requiring considerable skill and experience in the administration of justice, and it is just to presume that they are duly qualified to perform their duties. Would it not be competent for congress, under the powers vested in the general government, to provide by law for the appointment of justices of the peace, in each district, to be vested with powers under the laws of the United States, analogous to those exercised under state laws by justices of the peace under the state governments, without commissioning them as judges during good behavior, or giving them fixed salaries?

At the same time it may be proper to say, that if this argument, drawn from the constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the general and state governments,

the argument from the limitation of judicial power would be entitled to very grave consideration.

But we are not entitled to consider this a new question; we must consider it settled and determined by authorities, which it would be a dereliction of official duty, and a disregard of judicial responsibility, to overlook.

We have already referred to the great weight to be given, in the exposition of statutes, to what may be regarded as contemporaneous construction; and this construction is of the more importance, when the question turns upon the constitutionality of a legal enactment, made soon after the adoption of the constitution, and for the avowed purpose, not only of conforming strictly to the powers given by the constitution, but of carrying out the very objects and purposes contemplated by it. To this is now to be added an acquiescence both of the state and general governments, of their representatives and people, for nearly sixty years, and a series of judicial decisions, by the highest courts of our own and of the other states, and also of the supreme court of the United States, whose authority upon controverted questions, within their jurisdiction, and declared by their judgments, is binding upon the judges of state courts.

The constitutionality of the act of 1793, came directly before this court, and was argued and decided in 1823. *Commonwealth v. Griffith*, 2 Pick. 11. The opinion of the court was delivered by that most humane man and enlightened magistrate, the late Chief Justice Parker. After disposing of a technical question, he says: "This brings the case to a single point, whether the statute of the United States, giving power to seize a slave without a warrant, is constitutional." After alluding to the relative condition of the states, and the circumstances under which the constitution was made, he says: "They [the states by whose laws slavery was permitted] might have kept aloof from the constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider, then, what was the intention of the constitution." Again; "the constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined

by congress." "Whether the statute is a harsh one, is not for us to determine." "We do not perceive that the statute is unconstitutional, and we think the defence is well made out." The chief justice added, that this construction of the statute had been adopted ever since the federal constitution went into operation, by Lowell and Davis, justices of the district court of the United States. To weaken the force of this precedent, it has sometimes been said, when the case has been cited in argument, that this opinion was not unanimous. It is true, that Thatcher, J., dissented from the majority, as to the construction of the law; but he did not doubt its constitutionality. He admitted that congress might prescribe a new mode of apprehending a fugitive from service, which should supersede our law. In answer to the objection to the constitutionality of this statute, it was pressed upon the consideration of the court, in that case, that it had been in operation then thirty years, and its constitutionality had never been before questioned. If that consideration had weight with the court then, the acquiescence of thirty years more has greatly increased it.

I shall next cite the case of *Wright v. Deacon*, 5 S. & R. 62, in the supreme court of Pennsylvania, and I do it the more readily, because the opinion was delivered by Tilghman, C. J., whose authority was cited in the argument of this case. It arose on a writ *de homine replegiando*, sued out by a person claimed as a slave, against the prison keeper in whose custody he was detained, under a certificate granted conformably to the act of congress of 1793. He says that it is well known that the constitution could not have been adopted, unless the property in slaves had been secured; and that this constitution had been adopted by the free consent of the citizens of Pennsylvania. He then cites the article in the constitution. But, he says, it required a law to regulate the manner in which this principle should be reduced to practice, and cites the act of congress made for that purpose, and continues: "It plainly appears from the whole scope and tenor of the constitution and act of congress, that the fugitive was to be delivered up, on a summary proceeding, without the delay

Sims's Case.

of a formal trial in a court of common law." "But if this writ of *homine replegiando* is to issue from a state court, what is its effect, but to arrest the warrant," [issued under the act of congress,] "and thus defeat the constitution and law of the United States? The constitution and the law say, that the master may remove his slave by virtue of the judge's certificate; but the state court says that he shall not remove him. It appears to us, that this is the plain state of the matter, and that the writ has been issued in violation of the constitution of the United States. We are therefore of opinion that it should be quashed."

The same principles have been decided by the supreme court of the state of New York. *Jack v. Murtin*, 12 Wend. 311. This case was also commenced by a writ *de homine replegiando*, corresponding with our writ of personal replevin, sued out by the fugitive and alleged slave against his mistress. The case is full and decisive. The opinion, as delivered by Mr. Justice Nelson, is very instructive, but too long to be quoted here. It affirms the right of the master, as established by the constitution, the power and duty of the general government to pass laws to secure the right by suitable and practicable means, the exclusive power of congress to pass such laws, and the invalidity of all state laws on the subject.

But the judicial authority most to be relied on, and which, when distinctly ascertained, is binding and conclusive upon all subjects within their special jurisdiction, is that of the supreme court of the United States. Before the case hereafter cited, the question had come before Mr. Justice Washington, then of the supreme court of the United States, on the circuit, in *Hill v. Low*, 4 Wash. C. C. 327, in which he expressed his opinion in favor of the constitutionality of the act of congress to which I refer.

A case came before the supreme court of the United States, in 1842, on a special verdict, in which the point in question was fully discussed and deliberately settled. *Prigg v. Pennsylvania*, 16 Pet. 539. There was some difference of opinion among the judges upon minor points, but none, it is believed, upon the subject now under consideration, the constitution-

ality and binding force of the act of congress of 1793, and especially of that part of it which confers an authority on circuit and district judges, and on county and city magistrates, to take a summary jurisdiction, in the manner provided by the act of 1793. Some of the majority were of opinion, that congress could not, by its own enactments, require state officers, such as magistrates of counties, cities, and towns corporate, to take upon themselves the duty of exercising such jurisdiction; but they conceded, that the law conferred a sufficient authority on them to act, if they should think fit to do so, voluntarily, and if they were not restrained by state legislation. On the other hand, Mr. Justice McLean, agreeing to the general rule, as to state officers, was of opinion, that, under the peculiar circumstances, congress had the power to enforce this duty upon magistrates, and that they were not at liberty to decline it, but were legally bound to execute it. All the judges were agreed, that the state could make no law, and adopt no regulation, which would impair the right of an owner to pursue and retake a fugitive from labor; but they differed in one particular. The majority were of opinion, that the whole subject being placed under the jurisdiction of the general government, the state governments could make no law on the subject, even in aid of the claim of the slave owner; basing their judgment on the ground, that as the whole subject was placed exclusively under the cognizance of the general government, it was for congress to make all the rules and regulations upon the subject; that it was to be presumed they had, in the law in question, made sufficient rules and regulations to give effect practically to the right intended to be secured; and if that had not been done, it was solely for congress to supply the deficiency. They also relied on the ground, that if state laws went further into detail, and made provision for a course of proceeding beyond that indicated by the act of congress, it might tend to interfere therewith, and that if they prescribed precisely the same modes, they would be merely superfluous and embarrassing. On the contrary, some of the judges were of opinion, that the state legislatures might make laws on the subject, provided only that they should in no way impede or

Sims's Case.

hinder the proceedings under the law of congress. These, it is believed, are the principal differences in the opinions of the different judges. They all concur in the construction of the constitution, as intended to secure the right of a slave owner to regain the custody of a slave, who has escaped from service; in the right of the master to reclaim him in other states; in the constitutionality of the law of congress; and the nullity and invalidity of any and every state law which would impair the right, or impede or interfere with the provisions of the act of congress, providing for a summary proceeding before a judge or magistrate. Mr. Justice Baldwin concurred in the judgment of the court, but dissented from the principles laid down by the court as the grounds of their opinion, yet stated none of his own. He had, however, previously expressed an opinion on the circuit, that the act was constitutional, in the case of *Johnson v. Tompkins*, Bald. 571. The case in 16 Pet. appears to us to be authoritative and decisive, and it was so considered by the supreme court of the United States in the case of *Jones v. Van Zandt*, 5 How. 215, 229.*

We have thought it important thus to inquire into the validity and constitutionality of the act of 1793, because it appears to be decisive of that in question. In the only particular in which the constitutionality of the act of congress of 1850 is now called in question, that of 1793 was obnoxious to the same objection, viz., that of authorizing a summary proceeding before officers and magistrates not qualified under the constitution to exercise the judicial powers of the general government. Congress may have thought it necessary to change the preëxisting law, not in principle but in detail, because, as we have seen in the case of *Prigg v. Pennsylvania*, some of the judges were of opinion that state magistrates could not act under the authority conferred on them by the act of 1793, when prohibited from doing so by the laws of their own state, and some states had in fact passed such prohibitory laws. The present fugitive slave law may vary in other respects, and provide other and more rigorous means for

* See, also, charge of Nelson, J., to the grand jury, 1 Blatchf. Rep. 636.

Sims's Case.

carrying its provisions into effect, but these are not made grounds of objection to its constitutionality.

We do not mean to say that this court will in no case issue a writ of *habeas corpus* to bring in a party, held under color of process from the courts of the United States, or whose services, and the custody of whose person, are claimed under authority derived from the laws of the United States. This is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void. But it is manifest that this ought to be done only in a clear case, and in a case where it is necessary to the security of personal liberty from illegal restraint.

It seems to us to be the less necessary to call into action the powers of the state judiciary, in a case like this, because it is quite competent for the judges of the United States courts to bring the petitioner before them by *habeas corpus*, and ascertain whether he is detained by an illegal and colorable authority of an officer, claiming to act under the laws of the United States. This consideration is perhaps of no other importance, than as showing that there is no necessary occasion for drawing the authority of the state and the United States judiciary into conflict with each other. Such a conflict can hardly arise, although it may often seem impending; because it must generally appear, upon a cool and deliberate examination of all the facts and circumstances, whether a subject to which a law of congress relates is or is not within the jurisdiction of the general government; if it be so, it is conclusive. All judges of all courts are obliged to act on the same principles, and be governed by the same rules of duty; they are bound alike by oath to support the constitution of the United States, which declares that the constitution itself, and all laws made pursuant to it, shall be the supreme law of the land.

On the whole, we consider that the question raised by the petitioner, and discussed in the argument before us, is settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive upon this court.

Since the argument in court, this morning, I am reminded by one of the counsel for the petitioner, that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury.* We think that this cannot vary the result. The law of 1850 stands, in this respect, precisely on the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionality of one apply with equal force to the other; and the same answer must be made to them.

The principle of adhering to judicial precedent, especially that of the supreme court of the United States, in a case depending upon the constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union and harmonious action of the state and general governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the constitution, and has ever since been regarded, as essential to the peace, order and prosperity of all the United States.

If this were a new question, now for the first time presented, we should desire to pause and take time for consideration. But though this act, the construction of which is now drawn in question, is recent, and this point, in the form in which it is now stated, is new, yet the solution of the question depends upon reasons and judicial decisions, upon legal principles and a long course of practice, which are familiar, and which have often been the subject of discussion and deliberation.

Considering, therefore, the nature of the subject, the urgent necessity for a speedy and prompt decision, we have not thought it expedient to delay the judgment. I have, therefore, to state, in behalf of the court, under the weighty responsibility which rests upon us, and as the unanimous opinion of the court, that the writ of *habeas corpus* prayed for cannot be granted.

Writ refused.

* See Const. of U. S. Amendments V. & VII.; 3 Story on the Constitution, §§ 1639, 1640, 1788; 2 Inst. 50 to 54; *Lee v. Lee*, 8 Pet. 44; *Parsons v. Bedford*, 3 Pet. 433, 456; *Baker v. Biddle*, Bald. 394, 404.

NOTE. In delivering the opinion of the court in this case, allusion was made to the condition of the states, after the peace and before the adoption of the constitution, and to what would have been their condition, as independent states, had not the constitution been adopted. It was sufficient for the opinion then announced, to refer to this consideration in the briefest manner. But as it appears to me to have an important bearing upon the principal question, I have thought it useful to state the argument derived from that source, somewhat more fully, and to cite the authorities in support of it, by way of note to the opinion of the court.

The allusion in the opinion of the court was to the actual condition of the several states of the union, after their independence had been admitted by the treaty of peace, and before the adoption of the constitution. In construing a treaty or compact, made between two or more parties, it is a good rule for expounding the act, and considering the true intent and meaning of the terms in which it is expressed, to examine and ascertain what was the condition of the respective parties; what would have been their relative rights, powers, duties and obligations, had not such compact been entered into; and thus to determine how that condition was affected, and those rights, powers, duties and obligations limited, changed or qualified, by the actual stipulations of the compact.

It is too clear and manifest to require proof, that, independently of the qualified alliance, created by the articles of confederation, which it is conceded contained no stipulation on the subject of fugitive slaves, the several states would have been sovereign and independent, invested with all the rights and powers which are regarded by the received laws of nations as incident to sovereignty. Amongst these, is the absolute right of each state to regulate, by its laws, the conduct, state and condition of all persons and things within its limits; to prohibit the entrance of all persons, and the introduction of all things, according to its own views of its own policy and best good. And each is under a corresponding obligation to respect the territorial rights of others, and so to regulate the conduct of all persons within its own territory, as to prohibit them

from committing acts of violence or wrong on the territory of others, and to prevent its territory from becoming the asylum for persons or things injurious to another state. Each would have been entitled to defend its own rights, and to enforce the performance of these duties from others, by war, and, of course, to qualify and regulate the use and enjoyment of them by treaties of peace, and other mutual compacts.

Assuming this to be an outline of the rights and duties of sovereign states towards each other, stated in the briefest and most general terms, it becomes necessary to inquire what would have been their condition in respect to slaves and slavery, supposing that slavery was sanctioned and upheld by the laws of some, and abolished and prohibited by the laws of others. In doing this, it will be necessary to do little more than cite the case of *Commonwealth v. Aves*, 18 Pick. 193, 210, and the cases there cited and commented on.

By the received laws of nations, it seems to be well established, that however odious we may consider slavery and the slave trade, however abhorrent to the dictates of humanity and the plainest principles of justice and natural right, yet each nation has a right, in this respect, to judge for itself, and to allow or prohibit slavery by its own laws, at its own will; and that whenever slavery is thus established by positive law within the limits of such state, all other nations and people are bound to respect it, and cannot rightfully interfere, either by forcibly seizing, or artfully enticing away slaves, within the limits of the territory of the nation establishing it, or on the high seas, which are the common highway of nations. In the case cited, the language of this court is this: "In considering the law of nations, we may assume that the law of this state is analogous to the law of England in this respect; that while slavery is considered as unlawful and inadmissible in both, because contrary to natural right, and the laws designed for the security of personal liberty, yet, in both, the existence of slavery in other countries is recognized, and the claims of foreigners, growing out of that condition, are, to a certain extent, respected." In *Sommersett's case*, before Lord Mansfield, in 1771, 20 Howells's State Trials, 1, 82, which is the leading

case on this subject, and establishes the doctrine of the natural right to personal liberty in its fullest extent, we find a clear intimation of the principle above stated. Slavery, said Lord Mansfield, "is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law." "It is so odious, that nothing can be suffered to support it, but positive law." But this is a clear admission, and indeed this is manifest throughout his opinion, that although odious and contrary to natural right, it may exist by force of positive law. And this may be mere customary law, as well as the enactment of a statute. The term "positive law," in this sense, may be understood to designate those rules, established by long and tacit acquiescence, or by the legislative act of any state, and which derive their force and effect as law from such acquiescence or legislative enactment, and are acted upon as such, whether conformable to the dictates of natural justice or otherwise.

The principle is, that although slavery and the slave trade are contrary to justice and natural right, yet each nation, in this respect, may establish its own law, within its own territory. And even the slave trade is not regarded as piracy, even by those states who regard it in the abstract as unjust, except when it has been declared so by statute, which can only operate within its own limits; or except when it has been so declared by treaty between two or more powers, in which case it may be so regarded as between such powers, their citizens and subjects. This is confirmed by the English and American authorities, although the governments of both the United States and England have made strong declarations and passed very severe laws against the slave trade.

I refer to the case of *The Diana*, 1 Dodson, 95. A Swedish ship, captured on the high seas, with a cargo of slaves on board, by an English vessel, was carried into Sierra Leone, and there condemned. On appeal to the high court of admiralty, she was ordered to be restored by Sir William Scott, on the principle that the slave trade was allowed by the laws of Sweden.

Le Louis, 2 Dodson, 236, was the case of a French vessel

seized by an English vessel in time of peace. An elaborate opinion was given by Sir William Scott, in which he stated, that a right of visitation could only be exercised in time of war, or against pirates; and that the slave trade was not piracy by the laws of nations, except against those by whose government it has been so declared, or by treaty.

Two common law cases are cited in *Commonwealth v. Aves*, 18 Pick. 213, 214; *Madrazo v. Willes*, 3 B. & Ald. 353; *Forbes v. Cochrane*, 2 B. & C. 448, and 3 Dowl. & Ry. 679. It would be desirable to state these cases more at length; but full abstracts of them are given in 18 Pick., at the pages cited, and they are directly in point. I will only quote from the first case cited above, a remark of Mr. Justice Best, who says that the statutes of Great Britain "speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the British nation. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave trade is contrary to what may be called the common law of nations." In that case, in a suit in a British court, a foreign slave owner was permitted to add to his damages the value of certain slaves taken from a vessel wrongly interrupted in a voyage on the high seas by a British vessel.*

These authorities were recognized and confirmed, and the same principle declared, on great consideration, by the supreme court of the United States, in the case of *The Antelope*, 10 Wheat. 66. The positions affirmed are, that the slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations; that the slave trade may be lawfully carried on by the subjects of those nations who have not prohibited it by municipal laws or treaties; that the slave trade is not piracy, unless made so by the treaties or statutes of the nation to which the party belongs. These positions are fortified in the opinion of the court pronounced by Chief Justice Marshall, by reasons which must be regarded as quite conclusive.

* See also *Buron v. Denman*, 2 Welsh. Hurlst. & Gord. 167, 186.

If the slave trade can be so legalized by the local and positive law of any particular nation for its own subjects; if this odious traffic cannot be denounced as piracy, and treated as a violation of the laws of nations; *a fortiori* may the existence of domestic slavery be legalized by the laws of such nation, within its own limits, so that the rights growing out of it shall be respected by foreign powers, their citizens and subjects.

The result of this inquiry is summed up in the case cited, 18 Pick. 215, as follows: "Upon a general review of the authorities, and upon an application of the well established principles upon this subject, we think they fully maintain the point stated, that, though slavery is contrary to natural right, to the principles of justice, humanity and sound policy, as we adopt them and found our own laws upon them, yet, not being contrary to the laws of nations, if any other state or community see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of the existence of those laws, and we are not at liberty to declare and hold an act done within those limits unlawful and void, which the sovereign and legislative power of the place has pronounced lawful. If, therefore, an unwarranted interference and wrong is done by our citizens to a foreigner, acting under the sanction of such laws, and within their proper limits, that is, within the local limits of the power by whom they are thus established, or on the high seas, which each and every nation has a right in common with all others to occupy, our laws would no doubt afford a remedy against the wrong done."

It seems, therefore, to be conclusively settled, that it belongs to each independent power to decide for itself, whether it will uphold and maintain by its laws the existence of slavery; and although other powers may denounce it, and declare it founded in force and violence, injustice and wrong, yet they cannot disregard the rights flowing from it, when legalized by another power. The relative rights and obligations of independent powers on this subject are clearly stated in the opinion of Chief Justice Marshall, already cited. 10 Wheat. 122. Each

government, he says, "may renounce this right for its own people; but can this renunciation affect others? No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself; but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent." "As no nation can prescribe a rule for others, none can make a law of nations."

If then these states, prior to the adoption of the constitution, would have been sovereign and independent, these views of the established and recognized laws of nations indicate clearly what would have been their relative condition, and their respective rights. Slavery was likely to subsist in some states, and to be abolished in others. Each would have been clothed with certain rights, and bound to the performance of certain duties, which each would have a right to defend and enforce by war, to which there would be a constant temptation; and this could only have been avoided by treaty, regulating and providing for the enjoyment and security of such rights. It would have been in vain to say, that slavery being founded in wrong and injustice, any treaty tending to assent to, uphold and sanction it, would be itself immoral and wrong, and so could not conscientiously be made. Nations cannot elect the subjects on which they will treat; treaties are often made under great exigencies, as the best alternative which can be resorted to in order to avoid greater evils. In the infancy of our commerce and of our political power, we thought it not wrong to make treaties with the Algerines, and other piratical powers of the coast of Barbary, who had committed depredations on our commerce, and carried our citizens into captivity. We made treaties for ransoming our citizens held in slavery, and paid tribute to these acknowledged pirates, to induce them to forbear plundering our commerce, although such payments contributed directly to the upholding and encouragement of robbery and piracy. Having made such treaties, nobody would doubt that it was our duty to fulfil

them to the letter, any more than they would doubt our perfect right to refuse renewing them, the moment we were able to defend our own rights by our own strength. No; in making a treaty, we must take our relations with others as we find them; and make the best provision for our rights which is practicable under the circumstances. The question is, in adopting or rejecting a proposed mutual stipulation, not whether it is the most desirable on general grounds of expediency, but whether it is preferable to that which is the inevitable alternative if this is rejected.

But if no binding treaty could be made on the subject of slavery, what would have been the necessary alternative? It would have been a state of things in which acknowledged rights were in constant danger of being drawn into conflict between neighboring states, leading to a war likely to be perpetual, or perhaps to a still more disastrous result — that of some states being subjugated by others of superior physical strength, in a contest in which right and wrong would be disregarded, and violence and brute force would supersede the government of law and the reign of peace. Can this be regarded as an inflamed or exaggerated view of the condition of these states, as independent, but without compact with each other, if the views of the laws of nations above stated are correct? The states were equal in right, but unequal in power. In view of the laws of nations, there was no difference between Rhode Island and Virginia, or Pennsylvania and Delaware. With equal rights, constantly in danger of being brought into conflict, with radical differences of opinion and views, both of justice and policy, on the subject of slavery, the danger of hostile collision was imminent.* What alternative was there, but either a general treaty of alliance or a league, or a union under one government, to whom should be confided all these subjects of common and mutual interest. The latter expedient was adopted. The several states agreed to renounce their rights of sovereignty to a limited extent; among other subjects, the regulation of their intercourse with foreign powers, with the Indian tribes and with each other; the right of war and peace, and that of making treaties either with

foreign powers or with each other. Certain other subjects of common interest were also surrendered, and placed under the exclusive control and jurisdiction of the common government. Instead of enforcing their rights, as they could have done before, only by war, it was agreed to establish a general government, furnished with full and complete legislative, judicial and executive powers, to take cognizance of these rights, to provide by law for the regulation of them, to declare and apply them in an orderly course of judicature, and to carry them into full effect. On coming to this arrangement, it could not be kept out of view, that some states had large numbers of slaves, and were disposed to uphold and sanction the existence of slavery by their laws; whilst others denounced it and held it in abhorrence, as unjust and criminal, alike opposed to natural right and to good policy. It could not, however, but be known to the framers of the constitution, that in the states where slavery was allowed by law, certain rights attached to its citizens, which were recognized by the laws of nations, and which could not be taken away without their consent. They therefore provided for the limited enjoyment of that right, as it existed before, so as to prevent persons owing service under the laws of one state, and escaping therefrom into another, from being discharged by the laws of the latter; and authorized the general government to prescribe means for their restoration. This is the *casus fœderis*; to this extent the states are bound by their compact, but no further. Slavery was not created, established or perpetuated by the constitution. It existed before; it would have existed if the constitution had not been made. The framers of the constitution could not abrogate slavery, or the qualified rights claimed under it; they took it as they found it, and regulated it to a limited extent. The constitution, therefore, is not responsible for the origin or continuance of slavery. The provision it contains was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification, by which harmony and peace should take the place of violence and war. These were the circumstances, and this the spirit,

New England Glass Company v. Lovell and others.

in which the constitution was made; the regulation of slavery, so far as to prohibit states by law from harboring fugitive slaves, was an essential element in its formation; and the union intended to be established by it was essentially necessary to the peace, happiness and highest prosperity of all the states. In this spirit, and with these views steadily in prospect, it seems to be the duty of all judges and magistrates to expound and apply these provisions in the constitution and laws of the United States; and in this spirit it behooves all persons, bound to obey the laws of the United States, to consider and regard them.

The duties and relations of the states to each other, by the laws of nations, anterior to the making of the constitution, and the qualified but acknowledged right arising from the establishment of slavery in some states, and its exclusion in others, having been alluded to briefly in the opinion of the court, it was thought advisable, in this note, to expand the argument somewhat, arising from that consideration, but more especially to state the judicial authorities upon which it rests.



THE NEW ENGLAND GLASS COMPANY vs. GEORGE LOVELL & others.

In an action on the case against the owners of a vessel, for the loss of certain packages of glassware, by reason of negligence in stowing and conveying them; after proof of the place and manner of the loss of the vessel, and evidence on the questions, whether the goods were stowed under deck, and whether they could have been washed out by the sea, if they had been so stowed; a witness acquainted with the navigation about the place of the loss of the vessel, and who was near the place at the time of the loss, cannot be asked whether, taking into view the condition and situation of the vessel, and all the accompanying circumstances, the goods could, in his opinion, have been broken to pieces in the hold, or washed out of the hold, if they had been stowed therein

SHAW, C. J. This was case for negligence against the owners of a vessel, as common carriers, in not stowing properly under deck, and conveying safely, packages of glass-

New England Glass Company v. Lovell & others.

ware, by means of which they were lost. They had been laden on board the defendants' schooner, at Boston, and bills of lading given, promising to carry them safely to New York, "dangers of the seas excepted;" and the question was, whether the loss was within the exception.

It was proved that the schooner, whilst prosecuting this voyage, was driven ashore on Hart Island, at the head of Long Island Sound, and the goods lost. It was alleged by the plaintiffs, but denied by the defendants, that the goods lost were carried on deck, instead of being securely stowed under deck; and that became substantially the fact in issue. It was conceded, that if the packages of glassware were stowed on deck, without the permission of the shippers, it was proof of negligence, which would render the carriers responsible for the loss.

Much evidence was offered on both sides, upon the controverted fact, whether the packages of glassware were stowed under deck, and, as incident thereto, the plaintiffs introduced evidence tending to show, that if they had been stowed under deck, they would have been found there, although in a damaged condition, so that they could be identified; because, upon the facts proved, they could not have been washed out or broken to pieces, if they had been there. On the other hand, the defendants attempted to prove that the main hatch was forced off, and holes beaten in the bottom of the vessel, by force of the wind and sea, at the time the schooner stranded, by means of which the packages might have been washed out.

In this state of the evidence, Brown, a witness for the plaintiff, stated that he had been acquainted with the navigation about Hart Island thirty years, and been stranded there, and was employed in saving and getting off wrecked vessels, and was near the place on the night in question. The plaintiffs then proposed to ask him whether, taking into view the condition and situation of the vessel, and all the accompanying circumstances of the case, the goods in question could, in his opinion, have been broken to pieces in the hold, or washed out of the hold, if they had been stowed therein, in the manner testified to by the defendants' witnesses. This was

objected to and rejected. The question on this exception is, whether it should have been admitted.

In weighing circumstantial evidence, the opinion of a witness is often useful, and indeed necessary; but as its admission is contrary to the general rule, and limited to particular cases, it depends so much upon the other evidence which has been given, the nature of the facts to be proved, and the particular posture of the case, it is often extremely difficult to apply it in practice. The principle, upon which this evidence is admissible, is clear and entirely just. In applying circumstantial evidence, which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform; first, by a rigid scrutiny of the evidence to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When we have ascertained by experience, that one act is uniformly or generally the cause of another, from proof of the cause, we infer the effect, or from proof of the effect, we infer the cause. For instance; it being ascertained by long experience that arsenic is a deadly poison, if it were proved that one took arsenic and was found dead, the inference would be, that his death was caused by that poison; or if, upon a *post mortem* examination, arsenic were found in the stomach, it would be inferred that the death was caused by it.

Now when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. It is not because a man has a reputation for superior sagacity, and judgment, and power of reasoning, that his opinion is admissible; if so, such men might be called in all cases, to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt. Suppose a vessel has been

Marsh & another v. Billings & others.

stranded, and the charge is, that it resulted from unskilful and careless navigation. After all the evidence given of the state of the wind and weather, the position and distance of the land, the sail carried, the course steered, and the nautical manœuvres adopted, landsmen, men of common experience, would be unable to infer that the disaster was caused by bad seamanship, rather than inevitable accident; whereas, a man of nautical experience might draw a certain inference, and pronounce it attributable to the one or the other cause. *Folkes v. Chadd*, 3 Doug. 157; 1 Greenl. Ev. § 440; 6 N. Hamp. 463.

In the present case, this court are of opinion, with the judge who tried the cause, that these questions were not proper for the opinions of the witness; they were inferences to be drawn from facts within common experience, not depending on peculiar experience, especially such as the witness said he possessed. We think the same rule applies to the rejection of the opinions of the other witnesses, as stated in the answers given in their depositions, which were objected to, and rejected by the court.

In view of the difficulty of laying down any rule on this subject, precise enough for practical application; the only proper course seems to be, to keep the principle steadily in view, and apply it according to all the existing circumstances affecting the particular case. *Exceptions overruled.*

W. Sohler, for the plaintiffs.

B. F. Hallett, for the defendants.

WARREN MARSH & another vs. FREDERICK BILLINGS & others.

M. agreed with S., the lessee of the Revere House, to keep good carriages, horses, and drivers, on the arrival of certain specified trains, at a railroad station, to convey passengers to the Revere House, and in consideration thereof, S. agreed to employ M. to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing

Marsh & another v. Billings & others.

between S. and B., had been terminated by mutual consent; but B. still continued to use the words "Revere House" as a badge on his coaches and on the caps of his drivers, although requested not to do so by S.; and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case brought by M. against B., for using said badge and diverting passengers, it was held, that M., by his agreement with S., had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B. used those words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff, and a violation of his rights, for which this action would lie, without proof of actual, specific damage; and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers, as he could prove to have been actually diverted from his coaches to the defendant's.

THIS was an action of trespass on the case. The declaration contained two counts, the first of which stated that the plaintiffs, on the 16th of January, 1849, and ever since, had purchased for a valuable consideration, and were possessed of the sole and exclusive right and privilege of representing and acting for Paran Stevens, the lessee of the hotel or public house in Boston, known as the Revere House, at the station of the Boston and Worcester railroad company in Boston, in and about the carriage and transportation for hire of such passengers arriving at the station as should require the services and aid of hackmen and hacks authorized by Stevens to act for and represent him in this behalf, to transport them and their baggage from the station to the Revere House, and of the exclusive right of using, wearing, and placing upon their carriages and servants, stationed at said station, the name, badge, and designation of "Revere House"; and that, to enable them to exercise their said rights and privileges beneficially, the plaintiffs had been put to great outlay and expense, and had bought and maintained two carriages at a great expense, to wit, the sum of four thousand dollars, and had hired and kept divers servants at great wages; and, at the time of the committing by the defendants of the grievances complained of, were used and accustomed to obtain and transport for hire, from the station to the Revere House, a great number of such passengers and their baggage; and by reason of the transport-

Marsh & another v. Billings & others.

ation of such passengers and baggage, great profits and advantages had accrued, and still ought to accrue to the plaintiffs. Yet the defendants, well knowing the premises, but contriving and unjustly intending to injure the plaintiffs in the exercise of their said business or occupation, and to deprive them of great parts of their said profits and advantages,* without the license or consent of the plaintiffs, or of Stevens, and against the will of the plaintiffs, and of Stevens, did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, keep and maintain, and caused to be kept and maintained, at said station a large number of carriages and servants, with the name, badge or designation of "Revere House," marked, placed or worn upon them and each of them, in imitation of and as the name, badge and designation worn and used by the plaintiffs as aforesaid, and in order to denote to such passengers that said coaches and servants were authorized by Stevens to transport them and their baggage from the station to the Revere House, and did knowingly and deceitfully represent, and cause their said servants to represent to such passengers, that said coaches and servants were authorized and placed by Stevens at the station, to transport for hire said passengers and their baggage from the station to the Revere House; by means of which a great number, to wit, five hundred of such passengers were induced to enter the defendants' carriages with their baggage, and to desert and leave the carriages of the plaintiffs, and the plaintiffs thereby lost the profits and advantages which would otherwise have accrued to them from transporting for hire said passengers and their baggage from the station to the Revere House, and were subjected to great loss in their said business or occupation.

The second count was precisely like the first as far as the star (*) above, and then alleged that the defendants did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, interfere, and cause their servants to interfere with the plaintiffs, in the exercise of their said business or occupation, and in the obtaining and transportation by the plaintiffs of such passengers and their

baggage from the station to the Revere House, insoinuch that many passengers, to wit, five hundred, who were then and there about to enter the plaintiffs' carriages, were prevented from so doing, and the plaintiffs were thereby prevented from obtaining and transporting for hire such passengers and their baggage in such plenty as they would otherwise have done, and from realizing the profits and advantages which ought to have accrued to them in their said business and occupation, and were therein subjected to great loss.

At the trial before *Bigelow, J.*, in the court of common pleas, the plaintiffs, to prove their case, called, as a witness, *Paran Stevens*, the lessee of the Revere House, who testified that on the 1st day of May, 1849, he made a verbal agreement with the plaintiffs, by which they agreed to keep coaches at the station of the Boston and Worcester railroad in Boston, to convey passengers arriving at the station by the "long trains," who might desire to go to the Revere House, and further agreed to keep good horses and coaches, and to employ first rate drivers to do the work of conveying passengers, to the acceptance of the passengers and of Stevens; in consideration of which, he agreed to employ the plaintiffs to convey all passengers who might wish to go from the Revere House to the station, and authorized the plaintiffs to put on their coaches, and on the caps of their drivers, as a badge, the words "Revere House." He further testified, that a similar agreement had existed between him and the defendants, from the time when he first opened the Revere House, until the 1st of May, 1849, when it was terminated by him with the assent of the defendants, because the defendants did not do the work to his satisfaction; and that the defendants, under this agreement, had placed the words "Revere House" on their coaches, and on the caps of their drivers.

It further appeared in evidence, that after the 1st of May, 1849, and during the times alleged in the plaintiffs' writ, the defendants continued to carry the words "Revere House" on their coaches, and on the caps of their drivers; that their coaches and drivers so marked, were kept at the station of the Boston and Worcester railroad, and on the arrival of the

Marsh & another v. Billings and others.

"long trains," their drivers were in the constant habit of calling out "Revere House," in loud tones, in the presence and hearing of the passengers by said trains. It also appeared, that some time in July, 1849, Stevens requested one of the defendants to discontinue the use of the words "Revere House" on their coaches, and on the caps of their drivers; but that he refused so to do, saying he had a right to use them.

There was also some evidence that the defendants by their agents on one or more occasions stated to persons desiring conveyance to the Revere House, that they were the agents employed by the "Revere House," or by Mr. Stevens to convey passengers, and that the plaintiffs were not, or words to that effect, by means of which statements, some passengers were diverted from the coaches of the plaintiffs, and induced to go in the coaches of the defendants. Upon this point, however, the evidence was contradictory. One person in the employ of the defendants, called as a witness by the plaintiffs, testified that on one occasion he induced three persons to leave the coach of the plaintiffs, and go in the defendants' coach, by stating to them that his coach was the regular coach, and that they had got into the wrong coach. The plaintiffs also offered evidence that the defendants, during the time alleged in the plaintiffs' writ, carried large numbers of passengers from the station to the Revere House.

The plaintiffs, on the foregoing evidence, contended that they had an exclusive right to the use of the words "Revere House" on their coaches, and on the caps of their drivers; that these words were in the nature of trade marks, and that their action would lie, on showing that the defendants had used these words in the manner above stated.

But the judge instructed the jury that no person had the legal right to claim the exclusive privilege of conveying passengers from the station of the Boston and Worcester railroad to the Revere House; that any person, who saw fit to engage in it, had a right to carry on the business, and to indicate, by suitable signs on his coaches, by badges on the caps of his drivers, and by calling at the station in the hearing of passengers, the place to and from which he conveyed passengers;

that the plaintiffs in this case could not recover damages of the defendants, merely by showing that the defendants had on their coaches, and on the caps of their drivers, the words "Revere House," and that they had called out "Revere House," in the hearing of passengers in the station, and thereby obtained the conveyance of passengers from the station to the Revere House. But that if, on the whole evidence before the jury, the burden of proof being on the plaintiffs, the jury were satisfied that the plaintiffs were authorized by Stevens to hold themselves out as his agents at the station, for the transportation of passengers thence to the Revere House, and the defendants knowing this, by means of false representations that they were the agents of Stevens for this purpose, or that the plaintiffs were not, induced persons to go by the coaches of the defendants, instead of going by the coaches of the plaintiffs, and that thereby passengers were actually diverted from the plaintiffs' coaches, then the plaintiffs might recover of the defendants such damages as the plaintiffs had shown they had sustained in consequence of such false representations, and the loss of passengers thereby occasioned.

The jury returned a verdict for the plaintiffs, assessing damages in the sum of seventy five cents, and the plaintiffs excepted to the instructions of the judge.

W. Sohier, for the plaintiffs. 1. The plaintiffs do not claim the exclusive right to convey passengers from the Boston & Worcester railroad station to the Revere House, nor the exclusive right to the use of the words "Revere House." The first count in the declaration charges the defendants not merely with using the badges which the plaintiffs have a right to use, but with using the name "Revere House," in imitation of the plaintiffs' badges, and thereby inducing passengers to believe that the defendants were authorized by that house. The second count is for interfering with the plaintiffs' business.

Stevens, the lessee of the Revere House, had a right to grant the plaintiffs the privilege of marking their coaches and the caps of their drivers with the words "Revere House," to denote their employment by that establishment; the defend-

Marsh & another v. Billings & others.

ants, in persisting in using the same marks and badges, interfered with the plaintiffs' privilege; and this interference is a sufficient cause of action. The reason why no action on the case for such an injury is to be found in the books is, that where the courts have full equity jurisdiction, the remedy by injunction is more summary.

The acts of wearing and using these badges were of themselves fraud, and the jury should have been instructed that the use of the marks and badges by the defendants was *prima facie* evidence of an intent to hold themselves out as the authorized agents of Stevens; or, at least, that if they believed the defendants to have worn the badges and marks in question, for the purpose of inducing, in the public, the belief that they were the authorized agents of the Revere House, it would be such an interference with the plaintiffs' rights as would support this action. This case is precisely analogous to those in which trade marks were imitated; as in *Sykes v. Sykes*, 3 B. & C. 541; *Blofield v. Payne*, 4 B. & Ad. 410; *Rodgers v. Nowill*, 5 Man. G. & S. 109; *Taylor v. Carpenter*, 3 Story R. 458; *Coats v. Holbrook*, 2 Sandf. Ch. 586; or the name of a newspaper; as in *Bell v. Locke*, 8 Paige, 75; or the names, marks and devices on an omnibus; as in *Knott v. Morgan*, 2 Keen, 213. See also 2 Story on Eq. § 951. And *Stone v. Carlan*, 13 Law Reporter, 360, is precisely in point.

2. Upon the question of damages, the plaintiffs were held to a rule much too strict. The jury should have been allowed to give damages for the obstruction of the plaintiffs' rights, and to estimate the injury actually resulting to their business from the defendants' acts, taking into consideration the number of passengers carried by the defendants from the station to the Revere House. See analogous cases for the infringement of patent rights; *Whittemore v. Cutter*, 1 Gallis. 478, 483; *Earle v. Sawyer*, 4 Mason, 1; *Lowell v. Lewis*, 1 Mason, 182. But in the case at bar, the judge required the plaintiffs to prove the specific number of passengers actually diverted from the plaintiffs' to the defendants' coaches. This they could not, from the nature of the case, do with precise accuracy. In *Keeble v. Hickeringill*, 11 East, 573, note (a), which was an action on

the case for designedly frightening away wild fowl from the plaintiff's decoy pond, Lord C. J. Holt, to the objection, that the declaration did not state the number or nature of the wild fowl frightened away, answered that it was not possible for the plaintiff to know the number or nature thereof. And he held that the action well lay for the disturbance of the plaintiff's right.

This being an action of tort, and the tort being of a wilful nature, the jury were at liberty to give such damages as upon the whole evidence they should consider reasonable. *Sedgw. on Dam.* 488, and cases cited; *Leland v. Stone*, 10 Mass. 459, 462; *Weld v. Bartlett*, 10 Mass. 470; *Stone v. Codman*, 15 Pick. 297; *Richards v. Farnham*, 13 Pick. 451.

W. Brigham, for the defendants. Stevens, the lessee of the Revere House, had no exclusive right to convey passengers from the railroad station to his house, nor had he the exclusive right to put upon his coaches, or the caps of his servants, the words "Revere House." His business is that of keeping a public house, and not the transportation of passengers, and his authority as an innholder does not extend beyond his own premises. *Rev. Sts. c. 47, § 5*. Having no such right himself, he could assign none to the plaintiffs. The defendants, in common with all other citizens, have a right to convey passengers from the Boston & Worcester railroad station, through the public streets, to any public house, subject only to such regulations as the mayor and aldermen may prescribe; and they have a right also, by suitable declarations, indications and signs, to inform passengers that they can and will take them to the places designated. The use by the defendants of the words "Revere House" did not indicate that they were the authorized servants of that house, but only that that was their destination.

The cases of trade marks bear no analogy to the present. Whenever actions have been maintained for using trade marks and the like, it has been on the ground that the plaintiff had a property in, and an exclusive right to, the thing used. *Carrington v. Taylor*, 11 East, 571; *Sykes v. Sykes*, 3 B. & C. 541; *Rodgers v. Nowell*, 5 Man. G. & S. 109; *Taylor v. Carpenter*,

Marsh & another v. Billings & others.

3 Story R. 458; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Croft v. Day*, 7 Beavan, 84.

Knott v. Morgan, 2 Keen, 213, 219, cited by the plaintiffs, went upon the ground of fraud. The Master of the Rolls, in granting an injunction in that case, said: "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of the the plaintiffs." Here the judge allowed the plaintiffs to recover so far as there was any false representation or fraud, but not otherwise.

The only case which supports the plaintiffs' position is *Stone v. Carlan*, 13 Law Reporter, 360, decided by a single judge of the superior court of the city of New York, and the authorities therein cited do not bear out the decision.

The opinion was delivered at March term, 1852.

FLETCHER, J. This is an action on the case, sounding in tort. The principle involved in the merits of the case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle, which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade marks, and regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city, have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud

Marsh & another v. Billings & others.

and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out, falsely, as being in the employment, or as having the patronage and countenance of the keepers of well known and respectable public houses. It was said, in behalf of the defendants, that the lessee of the Revere House had no exclusive right to convey passengers from the Worcester railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words "Revere House," and could confer no such exclusive right on the plaintiffs; that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester railroad to any public house, and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of the case. The plaintiffs do not claim the exclusive right of using the words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact, and that the plaintiffs, and they alone, had such patronage of that house, by a fair and express agreement with the lessee. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the station to the Revere House. And they might perhaps use the words "Revere House," provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please, in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the

Marsh & another v. Billings & others.

plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols, which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words "Revere House" on the coaches, and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the lessee of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words "Revere House," not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House, as stated, they had, under and by virtue of that agreement, an exclusive right to use the words "Revere House," for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words, in the manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having the patronage and confidence of that house, and in that way to induce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights, for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satis-

Murray v. Shearer.

fied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case.

Though the instructions, as given, may have been intended to conform substantially to these views, yet, upon the whole, it seems to the court, that the principles of the law, upon which the rights of the parties were to be determined, were not stated with all that distinctness and accuracy, which the practical importance of the case requires.

The principles of law which govern this decision are so fully settled by numerous decisions, that it seems unnecessary to go into any particular examination of authorities, but it is sufficient merely to refer to some leading cases. *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Blofeld v. Payne*, 4 B. & Ad. 410; *Morison v. Salmon*, 2 Man. & Gr. 385; *Knott v. Morgan*, 2 Keen, 213; *Croft v. Day*, 7 Beavan, 84; *Rodgers v. Nowill*, 5 Man. G. & S. 109; *Bell v. Locke*, 8 Paige, 75; *Stone v. Carlan*, 13 Law Reporter, 360. *New trial ordered.*

EBENEZER MURRAY vs. LEONARD B. SHEARER.

The sureties on a bond, given to dissolve an attachment, conditioned for the payment within thirty days after final judgment of such amount as the plaintiff shall recover, are not discharged, nor the obligee's right of action against them suspended, by the commitment of the defendant on execution, after breach of the condition of the bond; and if the defendant be afterwards discharged on taking the poor debtors' oath, the obligee will be entitled, in an action on the bond, to judgment and execution for the amount recovered in the action in which the attachment was made.

THIS was an action of debt on a bond dated the 20th of December, 1848, executed by the defendant, as one of the

sureties of John T. G. Pike, the principal obligor therein, in the penal sum of \$300, for the purpose of dissolving an attachment of the goods of Pike, in a suit brought against him by the present plaintiff. The bond was in the usual form, conditioned for the payment to the plaintiff of such amount as he should recover, if any, in the suit upon which the attachment was made, within thirty days after the rendition of final judgment therein.

The writ bore date of the 20th, and was served on the 23d of July, 1849. At the trial, which was before *Bigelow, J.*, in the court of common pleas, it appeared, that before the commencement of this suit, and after thirty days had expired from the recovery of judgment in the original suit, namely, on the 18th of July, 1849, the plaintiff took out an execution upon the same, and levied it upon the body of Pike, the judgment debtor, who was held thereon at the time of the service of the writ in the present suit; that on the said 18th of July, Pike gave notice of taking the poor debtors' oath, and gave bond for the prison limits; and that after the service of the writ in the present action, and before the trial thereof, namely, on the 14th of August, 1849, he was admitted to the poor debtors' oath, and was thereupon discharged from custody.

Upon these facts, the judge instructed the jury to find a verdict for the plaintiff, and a verdict was returned accordingly; whereupon the defendant alleged exceptions.

J. W. Richardson, for the defendant, referred to *Clark v. Goodwin*, 14 Mass. 237; *Lyman v. Lyman*, 11 Mass. 317; *Almy v. Wolcott*, 13 Mass. 73; *Bailey v. Jewett*, 14 Mass. 155; *Jacques v. Withy*, 1 T. R. 557; *Tanner v. Hague*, 7 T. R. 420; *Line v. Lowe*, 7 East, 330; *Clarke v. Clement*, 6 T. R. 525; *Blackburn v. Stupart*, 2 East, 243; *Yates v. Van Rensselaer*, 5 Johns. 364; *Sweet v. Palmer*, 16 Johns. 181; *Little v. Newburyport Bank*, 14 Mass. 443; Rev. Sts. c. 98, § 25; *Sunderland v. Loder*, 5 Wend. 58; 2 Story on Eq. § 883; *Baker v. Briggs*, 8 Pick. 122.

G. Bemis, for the plaintiff, cited Rev. Sts. c. 98, §§ 16, 25; c. 97, § 59; *Dunning v. Owen*, 14 Mass. 157; *Clark v. Goodwin*, 14 Mass. 237; *Lyman v. Lyman*, 11 Mass. 317; *Bailey v.*

Jewett, 14 Mass. 155; *Willard v. Lull*, 20 Verm. 373; *Hall v. Hoxie*, 3 Met. 251; *Eastman v. Eveleth*, 4 Met. 137; *Cushing v. Arnold*, 9 Met. 23; *Caldwell v. Rice*, 6 Met. 493; *Woods v. Rice*, 4 Met. 481; *Ives v. Sturgis*, 12 Met. 462; *Farnham v. Gilman*, 11 Shep. 250; *Smith v. Brown*, 14 N. H. 67; *Stewart v. McGuin*, 1 Cowen, 99.

The opinion was delivered at March term, 1852.

DEWEY, J. The defendant denies the right of the plaintiff to maintain the action, upon the ground that the plaintiff has, by his own act, discharged the defendant from all liability on the bond declared upon, or at least, that he has suspended all right of action thereon, to a period posterior to the date of the writ. The act of the plaintiff set up, as sufficient to maintain this defence against a suit upon the bond, was the arrest of the body of the principal in this bond, who was his judgment debtor, and committing him to prison, where he was confined at the time of the institution of this suit, but subsequently discharged on taking the poor debtors' oath. This, it is contended, discharges all other security the party had for the payment of this judgment. The cases cited by the counsel for the defendant do not, however, fully meet the present case.

It may be true, as insisted by the defendant, that no action could have been instituted upon the judgment itself against the debtor, while he was in custody. The arrest and detention of the body are, for the time, a bar to any suit as regards such debtor, and may perhaps also operate to prevent the resorting to any other mode of enforcing the judgment against the debtor himself. But such arrest and commitment of the debtor on execution do not discharge legal liabilities that have become absolute before the arrest of the debtor on the execution. It does not necessarily follow, because the remedy against the debtor himself is suspended, that the right to enforce a fixed liability of a third person to pay the same debt is also suspended.

In the present case, the liability had attached before the arrest of the debtor. The defendant had, as one of two co-sureties, given a penal bond to pay a certain sum, named in the same, to the plaintiff; to the bond was, however, annexed

Murray v. Shearer.

the condition, in the usual form of a bond given to dissolve an attachment, to pay such an amount as the plaintiff should recover, within thirty days after final judgment in the suit upon which the attachment was made. This condition was not performed, and so the defendant forfeited his bond. All this took place before any act on the part of the plaintiff had occurred as to the arrest of the judgment debtor. There was already, then, a breach of the bond, and that breach entitles the plaintiff to this legal remedy therefor.

If the judgment debtor were now actually under arrest and imprisonment upon that judgment, it might present a question as to the damages to be recovered in the present case; as it might be urged that the body was, for the time being, and while thus in custody, to be deemed a satisfaction of the judgment. But however that might be, the case in its present circumstances presents no such difficulty. Although the debtor was under arrest, when this action was instituted, that arrest of the body has proved wholly unavailing; the debtor having taken the poor debtors' oath, and his body been released. The damages to be recovered by the plaintiff are therefore not to be affected by that arrest, as it has failed to produce any fruits, or to enforce the payment of any part of the execution. The whole of the claim of the plaintiff is now properly demanded. At the time of instituting this action, the plaintiff had a fixed cause of action, by the breach which had previously occurred, and before the arrest of the debtor. The damages for this breach are not to be reduced by reason of the subsequent ineffectual attempt to recover the same of the principal on the bond. The condition of the bond having been thus broken, a right of action had accrued, and the law says the obligee shall recover thereon what is due in equity and conscience. *Rev. Sts. c. 100, § 9.* That sum is clearly the amount of the judgment which the defendant stipulated to pay, when he gave the bond to dissolve the attachment.

Exceptions overruled.

GARDNER BREWER vs. EBENEZER E. DYER.

B. leased a shop to P., by indenture, for a term of years, during which D. signed and delivered to P. an agreement, not under seal, "to take the lease of the shop, and to pay to B. the rent as it becomes due, and to take the place of P. in all cases, so far as the shop, P. and B. are concerned:" P. then left the premises, and D., with the knowledge of B., entered upon and occupied them for some months, but left before the expiration of the term: During D.'s occupation, the bills were made out to P., but presented to and paid by D. It was held that the agreement given by D. to P., did not amount to a legal assignment of the lease; that the facts did not warrant a presumption of the surrender of the lease, so as to make D. liable to B. for the use and occupation of the premises; but that B. was entitled to recover the rent, for the remainder of the term, of D., in an action of assumpsit upon the agreement, as being a promise made to P. for B.'s benefit.

THIS was an action of assumpsit to recover the rent of a shop, formerly numbered 415, on Washington Street, in Boston, from the 1st of October, 1847, to the 17th of March, 1848; certain repairs made by the plaintiff on said shop during that time; and the taxes assessed thereon on the 1st of May, 1847. The parties agreed upon the following statement of facts, reserving to both parties the right to object to the giving of any such facts in evidence: The plaintiff leased said shop by indenture of two parts, for the term of three years from the 17th of March, 1845, to Henry F. Parmelee, who covenanted, among other things, to pay the rent and taxes to the plaintiff during said term. The lease was never cancelled, nor the lessee released from the obligations created thereby, unless the facts hereinafter stated constitute such cancellation and release.

Parmelee entered upon the premises, and paid rent and taxes under the lease, until the 26th of September, 1846, on which day the defendant signed and delivered to Parmelee the following paper, not under seal: "I hereby agree to take the lease of the store 415 Washington Street, and to pay to Gardner Brewer the rent as it becomes due, and the taxes, and to take the place of Henry F. Parmelee in all cases so far as the store, Parmelee and Brewer, are concerned. Boston, September 26, 1846. Eben. E. Dyer." And thereupon Par-

melee left the premises, and the defendant entered upon them, with the knowledge of the plaintiff, and without any dissent on his part, and continued in possession thereof until early in August, 1847, and paid the rent to the plaintiff according to the lease, until the 1st of October, 1847. The bills for rent paid by the defendant were made out to Parmelee.

In August, 1847, the defendant left the premises, and tendered the keys to the plaintiff's agent, who refused to receive them, and the shop remained vacant till the end of the lease; but repairs were made by the plaintiff's agent in February and March, 1848. The paper above mentioned, signed by the defendant, came to the possession of the plaintiff or his agent, on or about the 1st of July, 1848.

The case was submitted to the court of common pleas upon the foregoing facts, with the agreement that the court might draw all inferences therefrom that a jury would be justified in drawing, but reserving to both parties the right to object to the giving of any of such facts in evidence. That court gave judgment for the plaintiff, and the defendant appealed.

J. P. Putnam, for the plaintiff.

C. A. Welch, for the defendant.

The opinion was delivered at March term, 1852.

BIGELOW, J. The plaintiff seeks to maintain his action on various grounds. The first is, that there was a valid assignment of the original lease by Parmelee, the lessee, to the defendant. But we think it very clear that the writing, given by the defendant to Parmelee, does not amount to a legal assignment of the lease, so as to constitute, between the plaintiff and defendant, the relation of lessor and lessee. The original lease was under seal, and could, therefore, be assigned only by deed, it being a well settled rule of law, that the instrument of transfer must be of as high a nature as the instrument transferred. *Wood v. Partridge*, 11 Mass. 488; *Dennis v. Twitchell*, 10 Met. 180.

In this case the agreement between the lessee and the defendant was a simple contract, not under seal, and does not contain any apt and proper words of assignment. Nor is there any evidence to show that the lease was ever delivered

to or in possession of the defendant. For aught that appears, it was retained by and continued in the hands of Parmelee. But even if there were a doubt on this point, and if the facts did disclose an assignment of the lease, there is a decisive objection to the plaintiff's recovery in this form of action. The proper and only remedy of a lessor against the assignee of a lease for rent, is by an action of covenant or debt upon the deed; that being a remedy of a higher nature, and one applicable to the contract subsisting between the parties. So strictly is this rule held, that an action of assumpsit cannot be maintained upon an express promise by a tenant to the landlord, when the original lease is by deed, unless some new consideration forms the basis of the promise. *Foster v. Allanson*, 2 T. R. 479; *Reade v. Johnson*, Cro. Eliz. 242; *Codman v. Jenkins*, 14 Mass. 93; Archb. Land. & Ten. 148. If, therefore, the plaintiff could establish an assignment of the lease, it would not enable him to maintain his present action for use and occupation.

Another ground taken by the plaintiff is, that by the acts and agreements of the parties a surrender of the original lease is shown to have been made; and that the defendant can therefore be charged as a tenant at will, for use and occupation, upon proof of his beneficial enjoyment of the premises. But the facts in this case fall very far short of proving a surrender, to constitute which, it must be made clearly to appear, in the absence of any deed or written instrument, that it was the intention of the parties to create a new lease of the premises, and substitute a new and different estate for that granted by the original lease. See 2 Stark. Ev. (5th Amer. ed.) 342; Archb. Land. & Ten. 82. But, in the present case, nothing is shown which indicates any such intention; while there are several facts which tend very clearly to negative it. The original lease was not cancelled nor given up; the lessor, after the defendant went into occupation of the premises, continued to treat the original lessee, Parmelee, as liable, by making out the bills for rent, as they became due, in the name of Parmelee, although they were presented to and paid by Dyer, the defendant. And in the written contract

Brewer v. Dyer.

between Parmelee and the defendant, the lease is treated as in full force and effect, and not as cancelled and surrendered, by the very terms of the agreement by which the defendant agrees "to take the lease." Upon these facts, it cannot be inferred that there was any intention between the parties to surrender the lease. The defendant therefore cannot be held liable as a tenant at will.

But there is a ground taken by the plaintiff, upon which the court are of opinion that he is entitled to recover in this form of action; and that is, upon the principle of law, long recognized and clearly established in this commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Fellon v. Dickinson*, 10 Mass. 287; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, 17 Mass. 400; *Carnegie v. Morrison*, 2 Met. 381. In the latter case, all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; *Dutton v. Pool*, 1 Vent. 318; 2 Walford on Parties, 1144; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff; by Coleridge, J., in *Lilly v. Hays*, 5 Ad. & El. 551; but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded. In the case at bar, the agreement, although made between Parmelee and Dyer, is in express terms to pay the rent to Brewer, the plaintiff, and he is the party to be benefited thereby. It is made upon a valid consideration, as between Parmelee and the defendant; being the surrender of the shop by the former, and its occupation by the latter. To make the defendant liable, no consideration need move as between him and the present plaintiff. Nor is it any objection to the plaintiff's right to

recover, that Parmelee might also have a remedy on the contract, in case the plaintiff should not elect to adopt it. It does not operate to extinguish Parmelee's liability. The plaintiff, if he so elects, can seek his remedy on the agreement, or may rely on the original undertaking of his lessee; in which latter case, Parmelee could enforce the contract against the defendant. These principles are all well settled in the adjudged cases, and it is unnecessary to enlarge upon them. It seems to us that the case at bar falls clearly within them, and that the agreement in question, having been made for the benefit of Brewer on a sufficient consideration, and having been accepted and adopted by him, he can well maintain his action of assumpsit against the defendant.

We have not considered the question, whether the proper form of declaring would be by a count on the special agreement, instead of the common count for use and occupation, as that point was not raised in argument; and being a matter of form, if the declaration is bad, in this respect, it can readily be remedied by an amendment. *Judgment for the plaintiff.*

EBEN B. CROCKER & another vs. LAWSON B. STONE & another. EDWARD C. BATES & others vs. THE SAME.

Under *St. 1844, c. 178, § 4*, the dissent of a majority in value of the creditors of an insolvent debtor, who have proved their claims, must be filed within six months after the assignment, in order to defeat his discharge.

No discharge in insolvency is valid, even as against a creditor who proves his claim, and is himself the assignee, unless the third meeting of the creditors is held within six months from the time of the assignee's appointment.

THESE were actions of assumpsit, tried together in the court of common pleas, before *Wells, C. J.* The defendant *Stocker* was defaulted.

The defendant *Stone* relied upon a discharge under the insolvent laws of this state, which, if valid, would release him from the debts on which these actions were brought.

Crocker & others v. Stone & another.

The plaintiffs, to rebut this discharge, offered in evidence the record of the insolvency proceedings, under which the discharge was obtained, from which the following facts appeared: Stone petitioned for the benefit of the insolvent laws, on the 23d day of September, 1847. The first publication of notice was on the 27th of September, 1847; and the first meeting of creditors was held on the 7th of October, 1847; at which meeting the plaintiffs severally proved the claims sought to be recovered in these actions. No other claims were proved, except at the third meeting. At the first meeting, the plaintiffs elected said Edward C. Bates assignee, who accepted the trust, and was appointed assignee. The second meeting of the creditors was holden on the 15th, and by adjournment on the 18th of October, 1847. The third meeting of creditors was holden on the 15th of April, 1848, pursuant to an order passed by the master on the 24th of March, 1848, and was adjourned to the 7th of August, 1848, when the discharge, set up in defence of these actions, was granted to the defendant Stone by the master, in the form prescribed by law. No dividend has been declared, and the assignee has not received any moneys from which one can be made, and has rendered no account. On the 11th of April, 1848, all the creditors, who had proved their claims, filed with the master the following protest, signed by them: "The undersigned creditors of said Stone, who have proved their claims, do hereby protest and object against the grant of any certificate of discharge to the said Stone. Dated this twenty third day of March, A. D. 1848."

The presiding judge instructed the jury, that the discharge was, under the circumstances, invalid, and no sufficient defence to these actions. Whereupon the jury returned a verdict for the plaintiffs in each case, and the defendant excepted.

R. F. Fuller, for Stone. The creditors not having filed their dissent within six months, and thus complied with the condition of *St.* 1844, c. 178, § 4, their subsequent dissent was unavailing. *In re Pulver*, 6 Wend. 632. The language of *St.* 1838, c. 163, § 12, is satisfied, if the third meeting of creditors is "appointed"

Crocker & others v. Stone & another.

and "called" within six months from the appointment of the assignee; it need not be actually held within that period. The discharge is to be granted at the third meeting, and cannot be granted till the lapse of six months after the assignment; therefore the third meeting should not be held till the six months have elapsed. *Eastman v. Hillard*, 7 Met. 420. If the third-meeting is not held precisely at the time directed by the statute, the proceedings are not thereby vitiated, unless some party is prejudiced. *Ex parte East*, 3 Mont. Dea. & De Gex, 321; *St. 5 Geo. 2, c. 30, § 2*.

If the proceedings as to the third meeting were irregular, the discharge will not thereby be avoided as against a party not prejudiced. The alleged irregularity was in no way attributable to the debtor, but arose from causes beyond his control. *St. 1838, c. 163, § 12*; 2 Dwarries on Statutes, 641; Broom's Leg. Max. (1st ed.) 111.

The plaintiffs, by availing themselves, without objection, of all the benefits the proceedings in insolvency were designed to confer, have waived the irregularity. *Sanderson v. Taylor*, 1 Cus. 87; 1 Greenl. Ev. § 207; *Like v. Howe*, 6 Esp. R. 20; *Flower v. Herbert*, 2 Ves. Sen. 326; *Clarke v. Clarke*, 6 Esp. R. 61; *Goldie v. Gunston*, 4 Campb. 381; *Watson v. Wace*, 5 B. & C. 158; *Rankin v. Horner*, 16 East, 191; *Walker v. Burnell*, 1 Doug. 317; *Collins v. Forbes*, 3 T. R. 316, 322. It was the duty of the assignee to move the master to the appointment of the third meeting at the proper period, and he cannot object to a defect occasioned by his fault. *St. 1838, c. 163, § 12*. The assignee is one of the plaintiffs, and appointed by the votes of all the others, and so their agent; they can take no advantage of his wrong.

A. H. Fiske, for the plaintiffs.

The opinion was delivered at March term, 1852.

BIGELOW, J.* These are actions of assumpsit, in which one of the defendants, Stone, relies upon his discharge under the insolvent laws, as a defence. The plaintiffs object to the validity of the discharge, upon two grounds. The first objection

* FLETCHER, J., did not sit in these cases.

is, that a majority, in value, of creditors, filed their dissent to such discharge, according to *St. 1844, c. 178, § 4*. The assignment bore date of the 7th of October, 1847; the dissent to the defendant's discharge was filed on the 11th of April, 1848. The statute requires such dissent to be signified within six months after the date of the assignment. In the present case, more than six months had expired before it was filed. The statute is explicit, and recognizes no exception. The creditors of the defendant, not having complied with it, cannot invalidate the debtor's discharge upon this ground.

The remaining objection to the validity of that discharge is of a more serious character. It is, that the third meeting of the creditors was not held within six months from the time of the appointment of an assignee. It appears, by the record of the insolvent proceedings, that the assignee was appointed on the 7th of October, 1847, and the third meeting was called and held on the 15th of April, 1848. It has already been decided in *Sanderson v. Taylor*, 1 Cush. 87, that the twelfth section of the original insolvent act (*St. 1838, c. 163*), requiring the third meeting to be called within six months from the time of the appointment of assignees, was not repealed by *St. 1844, c. 178*. See also *Eastman v. Hillard*, 7 Met. 420. In this case, therefore, there was an omission to comply with the requisitions of the statute; more than six months having expired after the appointment of assignees before the third meeting was held. It was also decided in *Sanderson v. Taylor*, that a discharge was invalid, as against a creditor who had not proved his claim, if no third meeting had been held; and in *Williams v. Robinson*, 4 Cush. 529, it was determined that a discharge granted at a meeting of creditors called after the expiration of six months from the appointment of assignees was void. The reasons for that decision are fully stated in the opinion of the court in that case, and it is not necessary to repeat them. We consider it, therefore, an adjudged point, that no discharge is valid, when the third meeting is not held within six months from the time of the appointment of assignees. It has been found necessary, for the due and orderly conduct of insolvent

proceedings, and essential to the rights of creditors, to give this construction to the statutes, and it must, therefore, be the rule to govern all cases, although the reasons on which it is founded, may not apply with equal force to particular cases as they arise.

It was urged, at the argument, that the plaintiffs were precluded from invalidating the discharge of the defendant on this ground, because, by proving their claims against the estate of the insolvent, they had waived all irregularity in the proceedings. It is a sufficient answer to this objection, to say, that creditors are not responsible for the regularity of proceedings, which they cannot control, and which are to take place subsequently to their proof of claims. It was not their duty to call the third meeting. They might well suppose that the provisions of the statute would be complied with by those whose duty and interest it was to see them carried into effect. They might well prove their claims, without prejudice to their right to avoid the discharge, if, by future omissions or neglects, it should be rendered invalid. This point is also substantially determined in *Morse v. Reed*, 13 Met. 62. Nor can it avail the defendant, that it was not his fault that the third meeting was not seasonably called and held. We cannot know who is responsible for the omission. It is sufficient for the decision of this case, that the defendant fails to show a valid discharge. *Williams v. Robinson*, 4 Cush. 529. It was urged at the argument, that one of the plaintiffs in the second action was the assignee, and that he was, therefore, estopped from objecting to the defendant's discharge upon the ground before stated. But it is not by the statute made the duty of the assignee, of his own motion, to call the third meeting. He is only bound to call it "at such time as shall be appointed by the judge." He cannot be prejudiced in his rights for a neglect or omission of duty which devolved upon others. If it had been shown that the assignee, by any default of his own, had failed to call the third meeting in due season, the argument would have been quite decisive. But so far as the facts in the present case show, the assignee discharged his duty by calling the meeting at the time appointed by the master in chancery.

Exceptions overruled.

WILLIAM PRESCOTT JR. vs. WILLIAM ELM.

The notice, required by the Rev. Sts. c. 60, § 26, for the determination of an estate at will, when the rent reserved is payable at periods of less than three months, must not only be as long as the interval between the days of payment, but must terminate at the expiration of such an interval.

The date of a notice to quit, given by a landlord to his tenant, cannot be presumed, in the absence of other evidence, to be one of the days on which rent was payable.

THIS was an action on the Rev. Sts. c. 104, to recover possession of a parcel of land, with a dwelling-house thereon, situated on Chelsea Street in East Boston, and was commenced on the 24th day of October, 1848.

At the trial in the court of common pleas, before *Perkins, J.*, there was evidence tending to prove that the defendant was a tenant of the plaintiff, and that the rent was payable monthly; but no evidence was offered, by either party, to show on what day of the month the rent became due. It was in evidence, that on the 21st day of September, 1848, the plaintiff gave the defendant the following notice in writing: "City of Boston, September, 21st, A. D. 1848. To William Elm. You being in possession of a dwelling-house, and land under the same, situated and being in or near Chelsea Street, East Boston, in the city of Boston aforesaid, are hereby notified to quit and deliver up to me the premises aforesaid. Hereof fail not, or I shall take a due course of law to eject you from the same.

Witness, A MOORE.

WM. PRESCOTT, Jr."

The plaintiff relied on said notice, and not on any evidence of non-payment of rent. And the defendant, admitting that a month's notice was sufficient, requested the court to rule that, as the action was commenced on the 24th day of October, 1848, the notice was insufficient, because, as the defendant contended, it should appear that the notice covered an entire period intervening between the times of paying rent; that is, if the rent was payable on the first day of each month, and notice was given on the 21st day of September, the tenant was under no obligation to remove, and the plaintiff could not commence his action until the first day of November. But

the court declined so to rule, and instructed the jury, that if the rent was payable monthly, and a month's notice to quit was given, it was sufficient. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to said instructions.

D. Morgan, for the defendant.

S. C. Maine, for the plaintiff.

The opinion of the court was given at the November term, 1852.

METCALF, J. A question is now raised, for the first time, as to the construction of that part of § 26 of *c. 60*, of the revised statutes, which provides that an estate at will, when the rent reserved is payable at periods of less than three months, may be determined, by either party, by a notice in writing, if the time of such notice "be equal to the interval between the days of payment." That interval, in the present case, was one month; but whether the times of payment were the first or some other day of each month, does not appear. The notice to quit was given to the defendant on the 21st day of September, 1848; and this action was commenced on the 24th day of October following. The notice, therefore, was within the letter of the statute; that is, the defendant had a month's notice. The question is, whether the notice ought not to have been to quit at the expiration of a month from the day when the rent was payable. And we are of opinion that it ought to have been.

The reasons for our opinion are these: Before the passing of *St. 1825, c. 89*, which contained a provision like that in *Rev. Sts. c. 60, § 26*, which we are now considering, the law concerning the right of tenants at will and their landlords to notice, in order to determine the tenancy, was extremely doubtful. Some of the judges of this court held that such tenants and their landlords should have the same rights and be held to the same duties here, which pertained to them, and bound them, by the law of England. The other judges held that the English law was not in force here, and that the landlord might terminate the tenancy, without notice to the tenant, and that the tenant had only a right to a reasonable time,

after such termination of his tenancy, to remove his effects; and that it was to be decided by the court, as a question of law, in each case, what was a reasonable time for removal by the tenant. See *Howard v. Merriam*, 5 Cush. 570, 572. The St. of 1825, was intended to remove these doubts, and to adopt the *principle* of the English common law, except in cases of a tenant's refusal or neglect to pay rent due. That law not only requires that written notice shall be given, in order to terminate a tenancy at will, but also prescribes the length of the notice, in all cases except those in which the parties, either by express stipulation, or by agreement implied from custom, have otherwise contracted. In tenancies from year to year, (so called,) six months' notice is required. In a tenancy for less than a year, as for a quarter, a month or a week, the length of the notice is regulated by the letting; that is, a quarter's, a month's or a week's notice must be given. But the expiration of the notice must be with the expiration of the quarter, month or week. A notice to quit, which breaks into the quarter, month or week, is not a good notice. Comyn on Land. & Ten. 269; 23 Wend. 619. So, when the parties to a *written* lease of premises from one year, or other period, to another, expressly agree that the tenancy may be terminated by a notice of shorter length than the law would otherwise require, that notice, in order to be valid, must expire with the year or other period. *Doe v. Donovan*, 1 Taunt. 555; *Doe v. Green*, 9 Adolph. & Ellis, 658. And it has recently been held in this commonwealth, (*Baker v. Adams*, 5 Cush. 99,) that where there was a provision, in a written lease for five years, that either party might terminate it by giving the other party six months' notice, the notice must be given so as to expire at the end of a year of the term.

The St. of 1825, c. 89, § 4, which, as already has been said, enacted the principle of the common law of England, except as to tenants who do not pay rent due, was passed at the next session of the legislature held after the publication of the case of *Coffin v. Lunt*, 2 Pick. 70, which left it doubtful whether, by our law, a tenant at will was entitled to notice to quit. By that statute, which is reenacted, so far as it respects te-

nants at will, by the Rev. Sts. c. 60, § 26, it was provided that three months' written notice, given by either party to the other, should be sufficient in all cases; and that when the rent reserved should be payable at periods of less than three months, a notice equal to the interval between the times of payment, should be sufficient. Thus the legislature have expressly enacted that the length of the notice, which is required by the common law of England, shall be sufficient. when rent is payable oftener than quarterly, without expressly enacting at what time the notice shall expire, or what shall be the form of such notice. But we are of opinion that the form of the notice, and the time when the tenant is to quit, are both to be decided by the rules of the common law. For it is an established canon, in the interpretation of statutes, that they are to receive such a construction as may be agreeable to the common law, and that they are not presumed to make any alteration in that law, further or otherwise than the statutes themselves expressly declare. 11 Mod. 150; 2 Dwaris on Statutes, 696; 1 Kent Com. (6th ed.) 463. This rule of construction is constantly resorted to, in construing our revised statutes; and, without resort to it, many of the provisions of those statutes would be wholly inoperative. In the case before us, this rule of construction is specially commended to our adoption, by its certainty, convenience and justice. It gives the landlord rent, and obliges the tenant to pay it, so long as the demised premises are occupied, and no longer. Whereas, upon the construction for which the plaintiff contends, the landlord or the tenant must always be a loser, when the tenancy is terminated in the interval between the rent days. *Leighton v. Theed*, 1 Ld. Raym. 707, and 2 Salk. 413. See *Executors of Godard v. South Carolina Railroad Company*, 2 Richardson's (S. C.) Rep. 346.

The case must go back to the court of common pleas for a new trial. If, on such trial, it shall appear that the rent was payable on the 21st of each month, then the plaintiff may recover, unless the notice was defective in not mentioning the time when the defendant was required to quit. As that question has not been argued, we give no opinion upon it.

 Mitchell v. Pease.

It was suggested for the plaintiff, that as the notice to quit was given on the 21st of the month, it was to be presumed—nothing to the contrary appearing—that the tenancy commenced on that day. No authority was cited in support of this position; and there is none which supports it in the case of a notice like this. It seems that, by the English law, when notice is served on a tenant in person, requiring him to quit *at a certain day*, and he reads the notice and makes no objection to the time, or promises to quit as soon as he can, this is evidence from which a jury may infer that the tenancy began at the time at which the notice would expire. Archb. Land. & Ten. 218. When a case of that kind shall occur here, the court will decide, if necessary, whether that part of the English law is applicable to notices under the Rev. Sts. c. 60,

New trial ordered.

JAMES MITCHELL vs. ABRAHAM PEASE.

A person claiming property under a gift *causa mortis* from a deceased intestate, whose estate has been represented insolvent, cannot defeat an action of trover brought against him by the administrator to recover the value of the property, by showing that the only claim proved against the estate before the commissioners of insolvency, and which exceeded in amount the whole of the intestate's assets, including the property claimed by the defendant, was groundless, and was proved against the estate by false testimony, and that the administrator did not object to the proof of the claim, nor appeal from the allowance thereof, unless he also proves collusion between the creditor and the administrator.

THIS was an action of trover, by the administrator of the estate of David Pease, to recover the value of a trunk and its contents, including, among other things, several hundred dollars in money. .

At the trial before *Metcalf, J.*, at Nantucket, there was evidence that the trunk and its contents were the property of the plaintiff's intestate, who left the same in the care of his nephew, Joseph Pease, early in the month of April, 1849; that on the 28th of April, the intestate was suddenly taken

sick, and died on the 2d or 3d of May following; that on Sunday, the 29th of April, the intestate sent for the defendant, and requested him to go to Joseph Pease and get the trunk, and carry it to the defendant's house, and then come back to the intestate, and he would tell him what to do with it; that the defendant did as the intestate had requested, and, when he came back, told the intestate that he had so done; and that the intestate then told him that he gave the trunk and its contents to him, to do as he pleased therewith; saying that his daughter, who was his sole heir at law, and her husband, Henry Cottle, had used him in such a manner, that he did not intend that they should have any thing that he might leave. There was evidence, also, that the plaintiff had demanded of the defendant the trunk and its contents before this action was commenced, and that the defendant had refused to deliver them. The principal question, to which the testimony was directed, was, whether the intestate, at the time of the alleged gift to the defendant, was of competent capacity to make a valid gift.

After nearly all the testimony had been introduced, the plaintiff's counsel suggested, that the estate of the intestate had been represented to be insolvent; that commissioners had been appointed to examine the claims of creditors against his estate; that they had made their report to the judge of probate, with a list of the claims allowed by them; which report had been accepted and confirmed, and that the amount of such claims exceeded the amount of the intestate's assets, including the trunk and its contents.

The presiding judge thereupon inquired of the defendant's counsel, whether he admitted these facts; and he admitted that the records of the probate court showed, that the suggestions were true, and that all the proceedings of the commissioners, and of the probate court, in the matter of the intestate's insolvency, were conformable to the sixty eighth chapter of the revised statutes. But the counsel further stated, that the only claim, allowed against the estate by the commissioners, was an account of \$761.74, in favor of Henry Cottle, the intestate's son in law; and that no person appeared

Mitchell v. Pease.

before the commissioners to oppose the allowance of this claim. The defendant's counsel offered to prove, that, at the time of the intestate's decease, he was not indebted to Cottle, and that the claim, which was allowed, was fraudulently set up, and was procured to be allowed by false testimony or representation, for the purpose of avoiding the effect of the alleged gift to the defendant.

The judge expressed an opinion, that it was too late for the defendant to deny or question the validity of the allowance of the claim, and that it was unnecessary for the plaintiff to show the incapacity of the intestate to make a gift to the defendant; as the gift would not be valid against the intestate's creditors. But, at the request of both parties, the trial proceeded; and the evidence as to the fact of the testator's giving the trunk and its contents, and his capacity to give them, was submitted to the jury, with instructions, that if they should find that the intestate did give the trunk and its contents to the defendant, in view of approaching death, and was of sufficient capacity to make the gift, their verdict should be for the defendant, subject to the opinion of the whole court upon the other questions in the case; otherwise, that their verdict should be for the plaintiff. The jury were unable to agree on a verdict, and the case was taken from them, under an agreement of the parties, that if, in the opinion of the whole court, the defendant could be permitted to contest the allowance, by the commissioners, of the aforesaid claim against the intestate's estate, and if the insolvency of the intestate's estate did not affect the validity of the alleged gift, a new trial should be granted, unless the gift should be held by the whole court to be void, because made, if at all, on Sunday; otherwise, that the defendant should be defaulted, and the damages be settled by an assessor, to be appointed by the court, if the parties should not agree upon the damages, or upon an assessor.

T. G. Coffin, for the plaintiff.

H. H. Fuller, for the defendant, contended that the proceedings in the probate court were not conclusive, but only *prima facie* evidence, against persons not parties nor privy to

Mitchell v. Pease.

those proceedings; and that the defendant had a right to impeach and avoid them for fraud or other sufficient causes; and cited 1 Greenl. Ev. §§ 522 to 524; *Downs v. Fuller*, 2 Met. 135; *Pierce v. Jackson*, 6 Mass. 242, 244; *Peirce v. Partridge*, 3 Met. 44; *Gleason v. Dodd*, 4 Met. 333.

BIGELOW, J. It is conceded by the counsel for the defendant, that the gift of the intestate to the defendant would not be valid, if, at the time of making it, the donor was insolvent. It is also admitted, that the claim of Cottle, proved and allowed before the commissioners of insolvency, exceeds the entire amount of assets belonging to the estate of the intestate, including the property in question.

The proof and allowance of a claim against the estate of a deceased person before commissioners, and the acceptance and confirmation of such allowance by the judge of probate, under Rev. Sts. c. 68, are equivalent to a judgment; and a claim, thus proved and allowed, must be regarded as *res adjudicata*. Upon familiar principles, such judgment is binding and conclusive upon all persons who were parties or privies thereto, and cannot be impeached or again called in question by them. By the express terms of the statute, the executor or administrator is made party to the entire proceedings, having the right to appear and contest the claims offered for proof, and to appeal from the decision of the commissioners and have the claim tried and determined as at common law. In all this, the executor or administrator acts as the representative of the estate of the deceased, and in behalf of all those, who, as legatees or donees, have an ultimate interest in the property. The defendant, as donee *causa mortis*, took his title to the property, subject to the contingent right of the administrator to reclaim it upon the death of the intestate, and was bound to hold it and have it forthcoming when called for by the administrator, in case it was required for the payment of debts. Toller on Exrs. (4th ed.) 233; *Tate v. Hilbert*, 2 Ves. Jr. 111, 120; *Holland v. Cruft*, 20 Pick. 328.

It would seem to follow, that the rule of law, by which all persons, who are privies to a proceeding, are held bound by the judgment, is applicable to the defendant in this case.

The term privity denotes mutual or successive relationship to the same rights of property; all persons, who are represented by a party to a legal proceeding, and claim through or under him, or in privity with him, are concluded by a judgment, equally with the party himself. 1 Greenl. Ev. § 523. The defendant, by virtue of the gift to him by the deceased, was in privity with the administrator as to the personal estate of the intestate, and was represented by him, in the proceeding by which the claim of the creditor was proved and allowed. He cannot now, therefore, in this suit, seek to set aside or impeach it. 1 Jarman on Wills, (1st Am. ed.) 23, note; *Wood v. Medley*, 1 Hagg. Eccl. R. 645.

This conclusion is strengthened by a consideration of the result which would follow from a different doctrine. If the defendant were allowed to resist the claim of the administrator to the property of the intestate in his hands, upon the ground alleged in this case, the debt proved and allowed by the commissioners, and confirmed by the judge of probate, would not be thereby annulled, but would still be a valid, subsisting claim. The judgment could not be set aside as against the estate of the intestate, in a collateral proceeding, and it would still be binding on the administrator, and upon the assets in his hands. It would then follow, that one portion of the personal estate of a deceased person would be applied to the payment of his debts, and another portion be wholly exempted therefrom; or the entire assets might be withheld from the payment of a judgment against the estate of the deceased, which was still unreversed and in full force.

There was no evidence at the trial, nor is it contended, that there was any fraud or collusion between the administrator and the creditor, Cottle, in regard to the proof or allowance of his claim before the commissioners. The alleged fraud consisted in proving the debt by false testimony procured by Cottle. We have not, therefore, particularly considered what the effect might be upon the rights of the parties, if such fraud and collusion were proved. One thing, however, is quite obvious. If the defendant has been injured by neglect, or want of integrity and fidelity on the part of the adminis-

 Coffin & others v. Field & others.

trator, he has an ample remedy by a suit upon his official bond.

This view of the case renders it unnecessary to consider the other point raised at the trial, and, according to the agreement of the parties, the defendant must be defaulted and the case sent to an assessor to determine the amount of damages.



THOMAS COFFIN vs. THOMAS B. FIELD & others. ALFRED FOLGER vs. THE SAME. JOB COLEMAN vs. THE SAME. THE SAME vs. GEORGE EASTON & others. MARK FOLGER vs. THE SAME. EDWARD W. GARDNER vs. OLIVER W. EASTON & others. PHILIP H. FOLGER vs. JOSEPH VINCENT & others. HIRAM FOLGER vs. THE SAME.

The action of replevin, given by the Rev. Sts. c. 113, § 17, to one whose beasts are unlawfully distrained or impounded, does not exclude all other remedies at common law; trespass will still lie.

Actual knowledge, by the owner of beasts impounded, of the impounding thereof, is not equivalent to the written notice required by the Rev. Sts. c. 113, § 8.

The owner of beasts impounded does not waive the right to maintain trespass against the field-drivers by whom the beasts were taken and impounded, on the ground of irregularities or omissions in their proceedings, by paying the fees of the field-drivers and pound-keeper; nor by declaring to a third person, after the commencement of the action, that he should require the defendants to prove that the place where they took the beasts was a public highway.

THESE were actions of trespass *de bonis asportatis*, for taking and carrying away certain animals, (mostly sheep,) belonging respectively to the several plaintiffs. The defendants were field-drivers of the town of Nantucket, and justified the acts alleged against them, on the ground that the animals, described in the several writs, were going at large on the highways in Nantucket, contrary to law. The cases were all tried in the court of common pleas, before Hoar, J.; and verdicts being rendered therein for the plaintiffs, the several defendants alleged exceptions.

The first action was for taking and carrying away a bay mare on the 13th of June, 1848; and it was in evidence that

the plaintiff was the owner of the mare, and that she was taken up, while going at large on the highways in Nantucket, and not under the care of a keeper, by the defendants, as field-drivers, and by them impounded in the town pound. The mare, while on the way to the pound with other horses, was seen and recognized by the plaintiff's son, who, without pointing her out, offered to take her then, and pay the fees, if the defendants would give him a receipt. The defendants offered to give up the mare, but declined giving a receipt, on the ground, that the time and place were inconvenient for the purpose; and the mare was thereupon driven to the pound, and afterwards sold. An advertisement of the taking and impounding was inserted in the Nantucket Inquirer, a newspaper published in Nantucket, on Thursday, the 22d of June, and for three weeks successively thereafter, the last publication being on Thursday, the 12th of July, 1848. Application for the appointment of appraisers was made, and the appraisal took place on the same 12th of July. The sale was made on the 15th of the same month, having been previously advertised in the same newspaper. A notice of the taking and impounding of ten or more horses, among which was the mare in question, was also posted up in some public place in Nantucket, on some day between the 10th and 16th of June, 1848; but the notice contained no description of the animals. It was also in evidence, that after the making of the writ in this action, the plaintiff declared, "that his son was present when the mare was taken, and that the field-drivers had returned that they had taken up the mare on the highway at the north crossing of Long Pond, but there was no highway there; and that they had got to prove."

The defendants contended, and requested the presiding judge to instruct the jury that, upon the foregoing facts, the plaintiff's only remedy was by an action of replevin; that if the plaintiff, at any time previous to the sale, had notice of the impounding, and of the cause of it, no other notice was necessary; that no subsequent irregularities or omissions would make the defendants trespassers; and that the plaintiff, by making the declaration, "that the field-drivers had returned

that they had taken up the mare at the north crossing of Long Pond, but there was no highway there, and that they had got to prove," had waived all such irregularities and omissions, if there were any. The presiding judge declined so to instruct the jury, but did instruct them, that if the value of the mare exceeded \$30, the sale took place too soon; that if her value was less than \$30, too late; and that the sale was illegal, and a fatal objection to the defence.

In the other cases, some one or more of the points above stated were taken and relied upon by the defendants, and overruled by the presiding judge.

In the cases of *Folger v. Easton*, and *Gardner v. Easton*, it appeared that the plaintiff, after the taking and impounding of his sheep, went to the pound and took them out, first paying the pound-keeper's and field-driver's fees. The defendants thereupon contended, and requested the judge to instruct the jury, that such payment and taking away constituted an abandonment or waiver by the plaintiff of any right of action. But the judge ruled otherwise.

The cases were argued in writing.

H. G. O. Colby, for the defendants, cited, to the point that trespass would not lie, *Rev. Sts. c. 113, §§ 16, 17*; *Minot's Digest, Actions, I. 1, 2, 4, 5, 8*; *Elder v. Bemis*, 2 Met. 604; *Osborn v. Danvers*, 6 Pick. 98; *Anscomb v. Shore*, 1 Taunt. 261; *Sheriff v. James*, 1 Bing. 341, and 8 Moore, 334; *Six Carpenters' case*, 8 Co. 146; and, to the point that actual notice was sufficient, *Wild v. Skinner*, 23 Pick. 251; *Gilmore v. Holt*, 4 Pick. 258.

L. F. Brigham and *E. M. Gardner*, for the plaintiffs.

BIGELOW, J. These are actions of trespass *de bonis asportatis*, in which the defendants, as field-drivers of the town of Nantucket, seek to justify the taking of the animals described in the writs, on the ground that they were going at large, contrary to law.

The first and chief ground of exception to the ruling of the court below is, that the only remedy for a party, whose beasts have been unlawfully distrained and impounded by a field-driver, is by an action of replevin. This objection proceeds

upon the idea, that as the remedy by replevin is given in such cases by Rev. Sts. c. 113, § 17 & *seq.*, it operates to exclude all other remedy at common law. But this is an obvious misapprehension. When a statute confers some new right, and prescribes a remedy for a violation of that right, then the remedy thus prescribed, and no other, is to be pursued. But where a remedy existed at common law, and a statute creates a new remedy in the affirmative, without a negative, express or necessarily implied, a party may still seek his remedy at common law 1 Chit. Pl. (6th Am. ed.) 127, 164; *Colden v. Eldred*, 15 Johns. 220. The cases at bar clearly come within the latter rule. It is well settled, that a party who justifies the taking of another's property, under legal authority or process, must show that he has acted strictly in conformity with the requirements of law; otherwise, he will be considered a trespasser *ab initio*, and liable to an action of trespass at common law. The defendants, in all the above cases, having either failed to show that the beasts were liable to distress and impounding, or omitted, in some essential particular, to comply with the requisitions of the statute, are trespassers, and liable in this form of action for the damages occasioned by their unauthorized acts. *Purrington v. Loring*, 7 Mass. 388; *Gilmore v. Holt*, 4 Pick. 258, 263; *Adams v. Adams*, 13 Pick. 367; *Smith v. Gates*, 21 Pick. 55. This remedy has been frequently adopted in this commonwealth, in cases like the present, without objection. *Gilmore v. Holt*, and *Smith v. Gates*, *ubi sup.*; *Brightman v. Grinnell*, 9 Pick. 14; *Sherman v. Braman*, 13 Met. 407. See also *Folger v. Hinckley*, 5 Cush. 266.

The cases above cited are decisive of another exception taken by the defendants. They contended at the trial, and have argued here, that actual knowledge by the plaintiff, of the taking and impounding, was equivalent to the written notice required by Rev. Stat. c. 113, § 8, and rendered the latter unnecessary. But it is clearly settled otherwise. The defendants, having acted under an authority vested in them by law, are bound to comply with all the terms and conditions upon which it was granted. They must show that all their doings have been in entire conformity with the provisions of the

statute ; because, if a departure from the requisitions of law is once allowed, there will be no rule by which to regulate the proceedings in such cases. The defendants, therefore, cannot discharge themselves of their legal obligation, by showing that the plaintiffs had notice, derived from other sources, of all the facts which the statute requires to be made known to them by the defendants, in writing. If it were so, a verbal notice would be sufficient, and the statute would be rendered inoperative and useless. The plaintiffs had a right to insist on the precise notice required by law. Upon it their rights and remedies might materially depend ; and unless, by their acts or declarations, they have misled the defendants, and induced them to omit it, the failure to give the written notice, in the manner required by the statute, was a fatal defect in the proceedings, and deprives the defendants of their justification.

The remaining exception, founded on the refusal of the court to rule that there was a waiver by the plaintiffs of all irregularities and omissions in the proceedings, cannot be sustained. In the first place, the question of waiver is one of fact, and not of law, depending upon the acts and intentions of the parties and all the circumstances of each particular case, upon which it is the proper province of the jury to pass, and not of the court to rule. But, in the next place, we can see no evidence from which such waiver could be fairly inferred. The declaration of the plaintiff, in the first of these cases, to a third person, after the commencement of the suit, that he should require the defendants to prove that the place where his horse was taken was a highway, cannot be construed into any waiver of an irregularity in the subsequent proceedings. It had no reference to them, and was a statement entirely consistent with the right to object to the doings of the defendants, after they had taken and impounded the horse. In all the other cases, the taking of the animals from the pound-keepers by the plaintiffs, and the payment of the fees to him, were acts in the exercise of a legal right, and the only mode by which the plaintiffs could gain possession of their property, without resort to legal process. Rev. Sts. c. 113, §§ 3, 7. It cannot

Coffin & others v. Field & others.

therefore be regarded as a waiver of their right to damages against the field-drivers, for their previous tortious acts. Besides; the rule of law is well settled, that the return of property, wrongfully taken, to the owner's possession, and his acceptance of it, is available to the wrong doer only in mitigation of damages, and not in bar of the action. 2 Greenl. Ev. § 635 a; *Hammer v. Wilsey*, 17 Wend. 91. Surely the defendants ought not to object, that the plaintiffs took back their property, and now claim only such damages as they have sustained by the wrongful acts of the defendants in taking and impounding the animals, instead of leaving them in the pound to be sold, and claiming their full value of the defendants in actions of trespass. *Exceptions overruled.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1851,
AT LENOX.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. RICHARD FLETCHER,
HON. GEORGE T. BIGELOW, } JUSTICES.

JOHN ADAM & others vs. THE BRIGGS IRON COMPANY.

A bill in equity brought by one claiming an estate in three undivided fourths of the mines in a certain tract of land, with the right to pass and repass, to dig for and carry away the ores, against the owner in fee of the whole of the soil of said tract, for digging and carrying away ore, and wasting and destroying the same, and forcibly resisting and disturbing the plaintiff in the exercise of his rights, is not within the equity jurisdiction of this court, either on the ground of a nuisance by a disturbance of the use of a right of way, or as showing the parties to be tenants in common of the mines.

In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void.

THIS was a bill in equity. The case was argued at September term, 1850, upon a demurrer to the bill, by *G. Ashmun*

and *W. G. Bates*, for the plaintiffs, and *J. Rockwell* and *J. D. Colt*, for the defendants. The pleadings are sufficiently set forth in the following opinion, delivered at the same term, by

SHAW, C. J. This suit in equity was brought by the children and grandchildren of Samuel Forbes, who died in Connecticut, the place of his domicile, in 1827; and they alleged themselves to be devisees under his will, or the heirs of those devisees. They are all the descendants of Abigail Adam, wife of John Adam, and only daughter and heir at law of Samuel Forbes. It was objected by the defendants, that the will of Samuel Forbes had not been filed in, or proved and allowed by any probate court in this commonwealth, and so that the plaintiffs could not claim title under it. An amendment was afterwards allowed, by which the plaintiffs described themselves as heirs at law of Samuel Forbes. The defendants, having previously filed a general demurrer to the original bill, relied upon the same demurrer to the amended bill, and thereby admitted the claim of the plaintiffs, as such heirs at law.

The bill sets forth that, on the 21st of December, 1790, Jared Lane was the owner in fee simple of three undivided fourths of lot No. 62, in the second division of lots in Lanesborough, (which lot contained one hundred acres,) and was seised and possessed of the same, and then sold the same to John and Titus Wood and Jonathan Weed, and executed to them a deed thereof, in due form of law, reserving, saving and excepting from said grant, a full and ample right to all the iron or other ores in and upon said premises, with the right of way to pass and repass, to dig for, to cart and carry away the same from said premises. Of this deed, a copy is annexed, and referred to as part of the bill. In comparing this averment with the deed, there is some variance in the phraseology. In the deed it is thus expressed, "excepting, saving and reserving a full and ample right to all the iron and other ore, that may be found on the surface or in the bowels of the earth, of said one hundred acres of land, with liberty to pass and repass, cart and carry away the same." This lot of one hundred acres is further described as originally laid out to John Peck.

The bill further proceeds to aver, that Lane occupied the premises, and took ore therefrom, and on the 22d of March, 1800, sold his said reserved and excepted rights and interest to Samuel Forbes, and by his deed conveyed all his said interest to said Forbes. It alleges, that Forbes used said ore-bed during his lifetime, by himself, his servants and lessees, as far as his interest was concerned; and denies any adverse possession of the ore-bed, until 1847.

The bill then avers, that the defendant corporation, well knowing the premises, and being apprised in particular of the record title of Forbes, and the peculiar grant in the deed from Lane to Wood, Wood and Weed, with reservation and exception of the ores, as aforesaid, purchased a title to the soil, wherein the plaintiffs are entitled to an easement and other incorporeal rights, as aforesaid; and are now digging and carrying away the ore from said beds in a wasteful and unprofitable manner, and intend great waste and destruction; and expresses the plaintiffs' fears that the defendants intend the entire destruction of said ore, and irreparable injury to the plaintiffs. It alleges, that a person attempting, under the authority of the plaintiffs, to exercise their incorporeal rights in the premises, was driven away by force by the defendants' servants, whereby the plaintiffs were disturbed in the exercise of their incorporeal rights, and great wrong was thereby done thereto, to the nuisance of the plaintiffs in the premises. The bill prays for an account, an injunction and general relief.

The case came on to be argued upon the demurrer, the defendants insisting upon the ground, that this court had no jurisdiction in equity; because the facts set forth did not show a case of waste or nuisance. To constitute waste, they insisted there must be some relation, some privity of estate between the parties, and that no such privity was set forth in the present case. Whereupon, the plaintiffs, by their counsel, stated to the court, that they did not claim the jurisdiction on the ground of waste.

It was insisted in argument, that the case may be brought within the equity jurisdiction of this court, on the ground that

the bill charges and alleges a disturbance in the use of the plaintiffs' right of way, necessary to the use and enjoyment of their right to the ore and ore-beds.

It appears to the court, that the substance of the plaintiffs' complaint is, that they were possessed of an estate in the ore and ore-beds of the whole tract of land described, to the extent of three quarters thereof, with the right to dig for the same, place it on the grounds and carry it away—an incorporeal hereditament, indeed, but still an estate and real interest; that the defendants, being owners and in possession of the whole of the soil of said lot, denied their right to such ore and ore-beds, and right of opening them and taking and carrying away the ore, and forcibly resisted them and their servants in their attempts to do so. This, if true, might entitle the plaintiffs to an action of trespass, or trespass on the case, alleging or not alleging force; but the interruption of the right of way is mentioned merely as incidental and dependent, and not as the gravamen of the complaint. Were the plaintiffs' right to the ore and ore-beds, with the right of digging and carrying away the ore, admitted, and had they complained only of an interruption in going to and from the ore-beds, then the gravamen of their complaint, perhaps, would be a disturbance of their right of way only, and properly designated as a nuisance.

It was urged in argument, that the facts showed a case of tenancy in common of the mine, and therefore the court had jurisdiction. The objection to that view is, that no such case is set out in the bill; it nowhere asserts that the defendants are tenants in common with the plaintiffs in the mines. If it were so, and if the relief sought were to obtain a special decree, in the nature of a special partition, because, the common right being in its nature indivisible in the ordinary mode, it would be competent for this court to direct an equitable mode of using the right, which should do justice to both parties, the case would have stood very differently. On the contrary, the plaintiffs have rather studiously avoided alleging that the defendants had any interest in the mine, though they have alleged that the defendants had acquired a title in fee to

the soil. The court are therefore of opinion, that the bill does not present a case within the limited equity jurisdiction of this court.

After the delivery of the foregoing opinion, the plaintiffs having had leave to amend, amended their bill by averring that they were tenants in common of three quarter parts of the ore and ore-beds described, and of the right of opening and digging therefor, in all parts of said lot, and of laying the ores on every part of the same, with a right to enter and carry the ores away, and that the defendants were tenants in common of one quarter part of the same; alleging that the plaintiffs had no complete and adequate remedy at law to obtain partition; and praying a decree regulating the mutual enjoyment of their respective rights by the parties, in the nature of a special partition.

To this amended bill an answer was made, to which a replication was filed, and evidence was taken on both sides, the material part of which is stated in the opinion.

The case was argued at Boston, in February last, by *B. R. Curtis* and *W. G. Bates*, for the plaintiffs, and by *S. Bartlett* and *J. D. Coll*, for the defendants.

SHAW, C. J. The case again comes before the court on the question both of jurisdiction and of title.

Supposing the plaintiffs to have established their title to an undivided interest in the mines, ores and ore-beds, with the defendants, whether they be regarded as joint tenants, tenants in common, or partners, jurisdiction in equity of all questions and controversies between them, is conferred on this court, where there is not a plain and adequate remedy at law. Rev. Sts. c. 81, § 8. Supposing that there may be a right and estate in a mine, distinct from that of the soil in which it lies, there seems to be a peculiar fitness in resorting to equity, to adjust and regulate the mutual rights of the parties. It is manifest that partition cannot be made by setting off the surface by metes and bounds, because the quantity and value of the mines and ores, and the capacity and facility of access for

working them, bear no proportion to the area of the surface under which they lie. Indeed, in making partition at law, it has been found necessary to make special partition, directing the division of the profits, or the alternate enjoyment of the common property, as circumstances may require. In this commonwealth, such an estate in mines is very similar to a right and interest in water powers and mill privileges, which are held to be suitable subjects, when held by several, to be brought within the equity jurisdiction of this court. *Bemis v. Upham*, 13 Pick. 169; *Bardwell v. Ames*, 22 Pick. 333.

The impossibility that each party should work his own undivided part of a mine, practically prevents that mode of enjoyment, and manifestly requires some judicial proceeding to secure their respective rights. The working of a mine, in which there may be many owners, and in which each may set out an aliquot part of his whole interest, is regarded in England as a species of trade and partnership, which requires the interposition of equity jurisdiction, to adjust controversies. *Jefferys v. Smith*, 1 Jac. & Walk. 298. So where real property, as in mines and ore-beds, is so situated, that dower cannot be conveniently assigned at law, equity will take jurisdiction. *Stoughton v. Leigh*, 1 Taunt. 402.

But the main question, after all, is, whether the plaintiffs have proved any tenancy in common between themselves and the defendants in the ore and ore-beds.

We suppose it well settled, that there may be a separate estate in mines and ores, distinct from that of the land in which they are found. But *prima facie*, the owner of freehold lands is entitled to all the minerals and strata of coal, clay, ore, lime, marble and the like, not as a separate estate, but as a part of the fee and inheritance, and they will all pass by descent, or by conveyance, without special designation. But this presumption may be rebutted by evidence, showing a severance of the mines, and a distinct estate and interest in them, by grant or reservation; that is, the owner of the fee, having the general power of disposal, may grant all the ores and minerals, or any particular species of them, as lead, coal, marble, or the like, and still remain general owner of the land;

or he may grant the land, and except and reserve the mines to himself and his heirs. Or such grant or reservation may be established by proof of such adverse, exclusive and long continued use and enjoyment of the mines against the general owner of the land, as would amount to satisfactory proof of a lost deed, containing such grant or reservation. But, until such severance by the general owner, and the creation of such a distinct incorporeal right in the ores and minerals, is established by proof, they are to be deemed an inseparable part of the freehold, and pass with it in whole or in part, by deed or by act of law, as inseparably embodied in the freehold.

But when so severed by the general owner, and thus constituted a distinct estate, mines are still regarded as real estate, and the general laws regarding real estate will apply to them. They must be transferred by deed; contracts in relation to them are within the statute of frauds; dower is to be assigned in them; *Billings v. Taylor*, 10 Pick. 460; and all other rules regulating title to real estate, so far as they are applicable, will apply to them. In this commonwealth, in case of the decease of the owner intestate, they will descend equally to all the children; and in that respect are similar to the case of a descent in coparcenary to sisters in England. There, if the property consist only of mines, and these are incapable of convenient and separate partition, the respective rights of the owners will be regulated, and the profits divided, by a commission out of chancery. *Bainbridge on Mines*, 116. It appears, therefore, that the rights to ores and minerals, though embraced in the fee, are capable of being severed by the owner, but have no distinct existence until severed; but when so severed, they are capable of being held, conveyed and transmitted, by will or inheritance, and of being a separate estate, carved out of the fee.

It is contended on the part of the defendants, in the present case, that the relation of tenants in common of these ores does not exist between the parties, because the deed under which the plaintiffs claim, although it conveys three fourths of the land only, excepts and reserves, in terms, all the iron and

other ore under the whole hundred acres; and so, if the plaintiffs have any title, they are sole owners. All the conveyance, out of which such reservation and exception are made, is of three undivided fourth parts only of the soil of the hundred acres. The literal form of the reservation is of the whole; but perhaps this can hardly be regarded as the true meaning. The form being that of a reservation, the ordinary construction must be, that the reservation must be, out of the grant, of something, which, but for the reservation and exception, would have passed by it, and must, by implication, be so restricted. Had there been a previous severance of the estate in the ore from the general estate in the land, the terms of the exception might have been so construed. But on the contrary, it appears by the evidence, that Lane, the grantor, had acquired a title in fee to three undivided fourth parts of the land, and no more. The case shows no evidence of any such anterior severance of the ore from the general right. On the contrary, the case stated for the plaintiffs is, and we believe it so appears from the deeds, that Peck, being the owner of the whole in severalty, conveyed one quarter to Martin, and three quarters to Caldwell; that Caldwell, by two deeds, conveyed the same three quarters to Smith; and that Smith, by two deeds, conveyed the same to Lane, who first made the exception and reservation of the ores in his deed to Wood, Wood and Weed, under whom the plaintiffs claim. This deed, with its exception and reservation, is relied on as a severance.

This brings us to the specific ground of defence, which is, that the attempt to sever the ore from the general interest in the land, is void, as a grant by a co-tenant, whether it be regarded as an incorporeal hereditament, or as a distinct estate; because it is an attempt to create a new and distinct tenancy in common, between the one co-tenant and others, in distinct parts of the common estate, which is contrary to the rules of law. And the court are of opinion that this is a good ground of defence.

It is entirely settled as a rule of law, in relation to land, that the conveyance of any separate estate, by a tenant in common, by metes and bounds, is void as against the co-

tenants, and is available only by way of estoppel against the grantor and his heirs. *Bartlet v. Harlow*, 12 Mass. 348; *Varnum v. Abbot*, 12 Mass. 474; *Blossom v. Brightman*, 21 Pick. 283, 285; *Baldwin v. Whiting*, 13 Mass. 57; *Peabody v. Minot*, 24 Pick. 329. The ground upon which this doctrine is established is, that a tenant in common of an entire estate is entitled, on partition, to have his purparty assigned in one entire parcel, according to his aliquot part. The respective co-tenants may convey their shares to one or many grantees, as they please, so it be of the entire estate; because, whether there be one or many co-tenants, each may still have partition, which is inseparably incident to an estate in common, and have it in one parcel, and of like kind and quality with the estate which he holds in common. I have a moiety; my co-tenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other co-tenants with me. But all being seized of aliquot parts, in the same estate, and of like kind and quality, my right to partition is not disturbed by the number of co-tenants. But if he could convey his aliquot part, in specified parcels of the estate, he might diminish the value of my right, if not render it worthless.

We have seen that it is competent for a general owner not only to divide his estate by metes and bounds, and convey one parcel to one, and one to another, but also to divide it in another mode, by conveying mines to one, and quarries to another, and retain the general interest in the soil; and these special estates, when thus legally severed, may pass to heirs, devisees and purchasers, and be attended with all the incidents, and be governed by the common rules applicable to the holding of real estate. But if the owner of an undivided part of a real estate could do this, it would be attended with all the inconveniences to the co-tenants, arising from a conveyance of his interest in a particular part by metes and bounds. Suppose the defendants had not acquired the three quarters of the general estate, which was conveyed by Lane to Wood, Wood and Weed, they would still have had one quarter of the entire estate, under their anterior title, with all the ores,

minerals and quarries, opened or unopened, known or hidden, and would have been entitled to a partition, which would have given them a similar title to a quarter part in quality and quantity, by metes and bounds, so as to have an estate similar in character, to wit, a fee simple of such quarter, set off and divided, with all its incidents of mines, quarries and ore-beds, within those limits. If Lane's deed, conveying three quarters of the general estate to Wood, Wood and Weed, reserving three quarters of the ore and ore-beds to himself and his heirs, could avail against his co-tenants, the owners of this entire fourth part of the whole estate, with all its incidents unimpaired, with all its ores and mines unopened and unsevered, would be compellable to divide the soil, or general estate, with one set of co-tenants, and the mines and ores, with another or many other sets of co-tenants. Such a result would be attended with all the mischief and inconvenience arising from the act of a co-tenant, in attempting to convey his undivided part, in a particular parcel, instead of an aliquot part in the whole common estate. The same reasons, upon which it is held that such a conveyance is void against co-tenants, will also avoid the act of a part owner, in attempting to parcel out rights, in their nature indivisible, in definite portions of the inheritance, as the mines to one, and the general estate to another. For these reasons, we are of opinion that the reservation in the deed of Lane to Wood, Wood and Weed, Lane being himself a tenant in common of three fourths of the entire freehold estate concerned, was void, and that his subsequent deed to Samuel Forbes was void also, and that no interest or estate in the ore and ore-beds passed by it.

This view of the effect of the deed, which lies at the foundation of the plaintiffs' title, renders it unnecessary to consider whether the reservation was personal to the grantor for want of words of limitation to his heirs and assigns, or whether, by implication, a reservation out of a grant in fee was the reservation of an inheritable interest. It is also unnecessary to consider many other questions, both of fact and of law, which have been incidentally discussed.

Decree accordingly for the defendants.

Huntington v. Knox.

MEHITABEL HUNTINGTON vs. CHARLES W. KNOX.

When an agent, duly authorized, sells property belonging to his principal, and gives the purchaser a receipt in his own name, without stating his agency, acknowledging the payment of part of the price, and promising to deliver the property at certain times, places and prices specified ; the principal, on proving, by parol, his property, and the authority of the agent, may maintain an action in his own name for the balance of the price, subject to any equities which the purchaser may have against the agent.

The Rev. Sts. c. 28, § 201, do not require that bark, lying on the owner's land in the country, should be measured by a public measurer, before it is offered for sale.

THIS was an action of assumpsit for goods sold and delivered, and on the common money counts, to recover the balance of the price of a quantity of hemlock bark, alleged to have been sold and delivered by the plaintiff to the defendant; and was referred by rule of court to an arbitrator, who made an award in favor of the plaintiff, subject to the opinion of the court on the questions of law arising in the case, as appearing on the following report :

The plaintiff alleged that the bark in question was delivered under a contract, set forth in a writing, whereby one George H. Huntington acknowledged to have received of the defendant a partial payment of \$25, and in consideration thereof promised to deliver to him certain hemlock bark, at fixed prices per cord, at certain times and places specified.

The defendant objected to the introduction of evidence in support of said contract, or in proof of its execution, on the ground that it appeared from the receipt to be the contract of George H. Huntington and not of the plaintiff. The plaintiff then proposed to introduce parol evidence to show that the bark sold was the property of the plaintiff; that at the time of the sale George H. Huntington was the agent of the plaintiff; and that in making such contract he acted as such agent. The defendant objected, 1. That as such agency was not disclosed in the writing, parol evidence was inadmissible to prove it; and, 2. That if such evidence would be admissible in support of a declaration properly framed, it would

Huntington v. Knox.

not be competent evidence to support any of the counts in the plaintiff's declaration. The arbitrator ruled that if the plaintiff owned the bark, and was the principal in the contract, (although not disclosed at the time of making it,) she might maintain the present action, subject to all the equities that existed between the agent and the defendant, at the time the principal was disclosed; that parol evidence might be introduced to prove that the plaintiff was the principal in the contract, and that George H. Huntington acted as her agent; and that the plaintiff's declaration was sufficient.

It appeared to the arbitrator, from the evidence introduced before him, that the plaintiff was the principal in the contract; that the bark, which was then lying on the plaintiff's land, in the town of Becket, was sold to the defendant upon the terms set forth in the receipt; and that the defendant had notice, before the commencement of the action, that the bark belonged to the plaintiff, and that the plaintiff looked to him for payment therefor.

The defendant then objected that it did not appear that the bark was measured in conformity with the provisions of the Rev. Sts. c. 28, § 201. And the plaintiff admitted that it was not so measured. But the arbitrator ruled, that as it appeared that the bark was not offered for sale in any market, or upon any cart or other vehicle, and was designed and purchased for tanning and not for fire bark, the sale was not within the provisions of the statute.

M. Wilcox, for the plaintiff.

I. Sumner, for the defendant. 1. The writing signed by George H. Huntington is a complete contract between him and the defendant, and parol evidence is inadmissible to show that it was in fact the contract of the plaintiff. *Wright v. Weakly*, 2 Watts, 89; *Stone v. Vance*, 6 Hamm. 246; *Stackpole v. Arnold*, 11 Mass. 27; 2 Kent Com. 629; *Hastings v. Lovering*, 2 Pick. 214, 221; *United States v. Parmele*, Paine, 252; *Clark v. Wilson*, 3 Wash. C. C. 560. 2. The provisions of the Rev. Sts. c. 28, § 201, apply to all sales of bark in any public place; and are not limited to sales in a market, nor to bark sold for fuel. And the statute not having

been complied with, the sale is void. *Wheeler v. Russell*, 17 Mass. 258.

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of court, who made an award in favor of the plaintiff, subject to the opinion of the court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee, to the admission of parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defence, which the buyer might have, if the action were brought by the agent.

The court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one; for *prima facie*, and looking only at the paper itself, the property is sold by the agent, on credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence *aliunde*, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not

to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of *Higgins v. Senior*, 8 Mees. & Welsb. 834, it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds. But the court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. *Paterson v. Gandasequi*, 15 East, 62; *Magee v. Atkinson*, 2 Mees. & Welsb. 440; *Trueman v. Loder*, 11 Ad. & El. 589; *Taintor v. Prendergast*, 3 Hill, 72; *Edwards v. Golding*, 20 Verm. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest. *Garrett v. Handley*, 4 B. & C. 664; *Sadler v. Leigh*, 4 Campb. 195; *Coppin v. Walker*, 7 Taunt. 237; Story on

Kellogg v. Smith & others.

Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. *Hastings v. Lovering*, 2 Pick. 214; was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the *United States v. Parmele*, Paine, 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *prima facie*, a promise to the agent; yet it is only *prima facie*, and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts. c. 28, § 201, do not apply to the sale of bark, as made in this case.

Judgment on the award for the plaintiff.

JOHN KELLOGG vs. SILAS SMITH & others.

Certain Indians, in a grant of land, made a reservation of a tract, bounded north on a line some miles in length, "running a due west course" from a given point

 Kellogg v. Smith & others.

In a controversy, arising more than a hundred years after, between parties owning land on different sides of the Indian line, it was held, that evidence of general tradition and reputation, and of the understanding and occupation of the owners of lands bounding on the line, and of deeds made by them, and acts of the legislature referring to the line, would warrant the jury in inferring that a line, varying some degrees from a due west course, was located, laid out, assented to and adopted by the parties; and that, if the jury did so find, the line, so established, must be taken to be the true Indian line.

In this case, which was tried before *Shaw*, C. J., and reported by him, after a verdict for the plaintiff, for the consideration of the whole court, the opinion exhibits all the facts.

I. Sumner and *C. N. Emerson*, for the defendants.

W. Porter and *F. Chamberlain*, for the plaintiff.

FLETCHER, J. This was an action of trespass *quare clausum fregit*, for breaking and entering the plaintiff's close, situated in Great Barrington, and cutting and carrying away certain wood and timber. Both parties claim title to the *locus in quo*.

It appears that certain Indians, by a deed dated the 25th of April, 1724, conveyed certain lands to John Stoddard and others, a committee appointed by the legislature of the province to take the same, for the use of certain persons named and described, and their associates. This grant embraced the south west corner of Massachusetts; bounded south, on the line of Connecticut; west, on the province of New York; north, by a mountain named; and east, by a line nearly parallel to the Housatonic River, and about four miles east thereof. It embraced the territory now including Sheffield, Great Barrington, Mount Washington and Egremont.

In this deed, the Indians reserved for themselves a tract of land between the Housatonic River and the west line of the province, described as lying within two lines; one beginning at a certain brook described, at its mouth, where it runs into the Housatonic River, thence running a due west course to a monument on Taghconic Mountain, on the line of New York; and the other line, south of the last, commencing at a point on Housatonic River, lower down, and at the mouth of another brook, running parallel with the first line, in course due west to the line of New York.

The great question between these parties is, where is the true north line of this Indian reserve, by which they are respectively limited. The plaintiff claims the *locus in quo*, by virtue of a certain Joshua Roots's pitch, (through whose heirs and representatives the plaintiff claimed,) located and laid out by the proprietors of the Lower Housatonic Proprietary, the south bound of which was as follows: "Bounding south on the Indian line, the description being — the first bounds is a popple staddle and stones, standing on the north line of the Indian land." The defendants claim under the deed of Charles Sage to Silas Smith, dated the 23d of February, 1835. The boundary line of the lands granted by this deed is described as running from a point named, "north 2° east, sixty rods, to a monument of stones on the north Indian line, so called; thence east on the Indian line, one hundred and sixty seven rods, to a walnut tree, marked," &c. The plaintiff under the Housatonic Proprietary does not claim any land lying south of the Indian line; and the defendants, claiming under the Indian reserve, claim no land north of the north Indian line. The question, therefore, between the parties, as before stated, is, where is the true north line of the Indian reserve, by which they are respectively bounded?

No actual survey and location of this reserve is now produced; but some deeds and other instruments are produced, made at a somewhat later period, alluding to such survey. A great many deeds were produced, bounding estates on various parts of this line, in which it is described as being, instead of a line due east and west, west 5° 30' north, or east 5° 30' south, which is the line as claimed by the plaintiff. There are also some legislative acts, as the act incorporating the town of Great Barrington, by a line nearly coincident to the present dividing line between Sheffield and Great Barrington, which is west 5° 30', north, or very near it.

The defendants contended that the true Indian line was a due east and west line, independent and exclusive of any traditionary or other evidence of a reputed line, or varying from a due east and west line. On the other hand, the plaintiff insisted that the line on which the defendants' deed is

bounded, being "the Indian line, so called," is the line on which for a long period estates have been bounded, as the reputed Indian line, as understood and practically used by coterminous proprietors.

Upon this subject the jury were instructed as follows: "The question is, what the defendant Smith took by his deed from Charles Sage bounding the estate granted, north 'on the north Indian line, so called?' By the true construction of this deed, the grant must be bounded on the north, not necessarily by the line described in the Indian deed and the reservation contained in it, if the line, therein described as a due east and west line, was not the actual line by which the Indian land was practically laid off and located on the ground; that is, if it was not the line by which the Indians, by virtue of their reservation, actually occupied and held, on the one side, and the grantees, by virtue of their grant, held and occupied, on the other. If the general tradition and reputation, the understanding and belief, of those holding lands bounding on each side of the north line of the Indian reserve, for a great length of time, have been, that a certain line is the north line of the Indian reserve, and grants and conveyances have conformed to it as the Indian line, though not an east and west line, but a line varying a few degrees from it, this is evidence from which a jury may infer that a dividing line north, between the Indian reserve and the land granted, was located, laid out, assented to and adopted by the parties, as the dividing line and north line of the Indian reserve. If they do so find, the line thus defined, located and laid down, and long reputed and understood to be the true north Indian line, though not a due east and west line, must be taken to be the north Indian line, so called, and the north bound of the defendant Smith's grant, as contained in the deed from Sage, and he took no seisin or title north of that line."

Under these instructions, the jury, upon the evidence submitted to them, found a verdict for the plaintiff. The inquiry now is, whether or not the instructions were correct.

The learned counsel for the defendants assumed, in the argument, that the question as to the Indian line was a question

of construction of the Indian deed of 1724, and upon this assumption maintained that the evidence as to the actual line was not admissible, as tending to control and vary the deed. The infirmity of the argument was in assuming that the question was one of construction of the deed. The question was not one of construction of the deed, and the evidence had no tendency to vary or control the deed, and was not admitted or used for that purpose.

The evidence was admitted and used, to show that, in point of fact, a dividing line north, between the Indian reserve and the land granted, had been for a great length of time located, laid out, assented to and adopted by the parties as the dividing line and north line of the Indian reserve. Whether such a line had in fact been established by the parties was a question of fact, to be settled by the jury upon the evidence in the case. There can be no doubt that the evidence was competent to show the existence of such a line.

The jury have found, upon competent and sufficient evidence, that the parties had established such a line, which had long been held, and conformed to in grants and conveyances, as the Indian line; and the question now is, whether this line, thus established, may be totally disregarded and held of no avail, because it varies somewhat from the point of compass given in the Indian deed, and a line now be run according to the points of compass given in the deed, as for the first time, a century and a quarter after the making of the deed. It is believed that there is no principle or authority which would warrant such a proceeding.

It seems to be settled by a course of decisions of the supreme court of New York, that where the owners of adjoining lots of land settle and establish a division line between them by express parol agreement, and their agreement is immediately executed, and is accompanied and followed by actual possession according to such line, the agreement is binding and conclusive, and such division line shall not be disturbed, though it may afterwards appear, that it is not the true line according to the paper title. So when no express agreement is shown, long acquiescence by one proprietor in

the line assumed by the other is evidence, from which such agreement may be inferred. *Jackson v. Bowen*, 1 Caines, 358, 362; *Jackson v. Dysling*, 2 Caines, 198, 201; *Jackson v. Vedder*, 3 Johns. 8, 12; *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Ogden*, 7 Johns. 238, 242; *Jackson v. Douglas*, 8 Johns. 367; *Jackson v. Gardner*, 8 Johns. 394, 406; *Jackson v. Smith*, 9 Johns. 100; *Jackson v. McCall*, 10 Johns. 377, 380; *Jackson v. Van Corlear*, 11 Johns. 123; *Jackson v. Freer*, 17 Johns. 29; *Rockwell v. Adams*, 7 Cow. 761, and 6 Wend. 467; *McCormick v. Barnum*, 10 Wend. 104; *Dibble v. Rogers*, 13 Wend. 536. In most of these cases there had been a possession of more than twenty years, according to the line, but in several of them the possession had been for a less time than twenty years, there being no sufficient adverse possession to make a title, the decision depending on the force of the parol agreement, and the occupancy according to such agreement. No particular time appears to have been settled as necessary, during which such occupancy should have continued; and the length of the time of the occupancy was different in the different cases. The decisions in the cases referred to above were not overruled by the court of errors in *Adams v. Rockwell*, 16 Wend. 285, though the court of errors reversed the decision of the supreme court in that case, apparently on the ground that there was no evidence to show that a line had in fact been settled and established by agreement of the parties.

It has also been adjudged, by the superior court of Delaware, that a parol agreement, fixing a dividing line of lands, and ascertaining its position on the ground, with possession immediately following, is conclusive on the parties, and cannot be controverted; and that such an agreement is not within the statute of frauds. *Lindsay v. Springer*, 4 Harrington, 547. The same doctrine is held in other states. *Avery v. Baum*, Wright, 576; *Ebert v. Wood*, 1 Binn. 216; *Chew v. Morton*, 10 Watts, 321; *Gilchrist v. McGee*, 9 Yerg. 455; *Gray v. Berry*, 9 N. H. 473.

It is not maintained in these cases that a title to any land is conveyed by the parol agreement. The decisions turn upon the binding form of the agreement. A division line, or divi-

sion fence, is regarded as the subject matter of a valid contract, in regard to which parties in interest may be so bound by their parol agreement, that a line so established, and accompanied by actual occupancy, cannot afterwards, at the will of either party, be disturbed or broken up. The mischievous consequences of a different doctrine entered into the considerations upon which these decisions were founded. Relying upon the permanency of a division line, established by deliberate and express agreement, a party might incur great expense in buildings or other improvements, or alienate land with covenants according to such line, and thus be exposed to great loss and injury, by unsettling a line thus voluntarily agreed on and settled.

But a different doctrine has been held in Vermont and Maine. *Crowell v. Bebee*, 10 Verm. 33; *Gove v. Richardson*, 4 Greenl. 327; *Colby v. Norton*, 1 Appl. 412.

In this court it was decided, in *Whitney v. Holmes*, 15 Mass. 152, that where a partition line was established by referees appointed by the parties, the parties were not concluded by the line thus settled, but that the matter was still open to litigation, and that one of the parties might show that his land extended beyond the line. But in *Goodridge v. Dustin*, 5 Met. 363, it was decided that a division line, settled by referees under a rule of court, was conclusive and binding on the parties. This decision was placed on the ground, not that the land passed by the award, but that by force of the agreement of the parties, they would not be permitted to allege facts contrary to those directly established by the award — that the award operated by way of estoppel. In *Tolman v. Sparhawk*, 5 Met. 469, it was held, that where owners of adjoining lands, intending to establish the divisional line according to the true boundary, agree by parol on a line that does not conform to such boundary, and afterwards hold possession according to such conventional line, such agreement, so made by mistake, and the possession under it, do not estop the party who has suffered by the mistake from asserting his title to the land that lies between the true boundary line and such conventional line, and recovering the same in a real action

seasonably brought. Thus it seems to have been decided in this court in one case, that a line fixed by referees was not binding and conclusive; and in another case, that a line fixed by referees was binding and conclusive; and in another case, that a line fixed by the parties themselves, by express agreement, was not binding and conclusive. But the case now under consideration belongs to a different class of cases, and is in no way affected by the decision in *Tolman v. Sparhawk*.

There is another class of cases resting upon a principle well established by numerous and uniform decisions. If a deed of land refer to a monument not actually existing at the time, and the parties afterward fairly erect such monument, intending to conform to the deed, the monument so placed will govern the extent of the land, although not entirely coinciding with the line described in the deed. *Makepeace v. Bancroft*, 12 Mass. 469; *Lerned v. Morrill*, 2 N. H. 197; *Kennebec Purchase v. Tiffany*, 1 Greenl. 219; *Waterman v. Johnson*, 13 Pick. 261, 267; *Frost v. Spaulding*, 19 Pick. 445; *Blaney v. Rice*, 20 Pick. 62.

There is another well settled rule, which governs a class of cases, to which the case now under consideration very clearly belongs. When, in a deed or grant, a line is described as running a particular course, from a given point, and this line is afterwards run out and located, and marked upon the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive and must be adhered to, though it may be subsequently ascertained that it varies from the course given in the deed or grant. The line thus actually marked out on the earth's surface controls the course put down on the paper. The instrument of conveyance is not understood as requiring that the line to be run shall necessarily be absolutely and precisely according to the course described, which would probably be quite impracticable, but that the line shall be fairly run, in a skilful and proper manner, and that the actual, practical result adopted and acted on, shall be conclusive upon the parties in interest.

Thus, in the case of *Missouri v. Iowa*, 7 How. 660, it

appeared that in an Indian grant of land to the United States, a line was described as running a due east course from a given point. This land was afterwards run out, and located and marked, under the authority of the United States, and the line thus marked out and located had been in various ways recognized and acted on as the true line. It was held by the supreme court of the United States, that this line, thus actually located, must be adhered to, though it was found that it varied some degrees from the due east course described in the grant. This decision fully and directly sustains the instructions of the court in the case now under consideration, as the two cases are substantially alike in their material facts. There are many other cases in which the courts have maintained and confirmed the same principle. *M'Nairy v. Hightour*, 2 Overton, 302; *Newsom v. Pryor*, 7 Wheat. 7; *Avery v. Baum*, Wright, 576; *Cowan v. Fauntleroy*, 2 Bibb, 261; *Young v. Leiper*, 4 Bibb, 503; *Buford v. Cox*, 5 J. J. Marsh. 582, 587; *Blasdell v. Bissell*, 6 Barr, 258; *Thompson v. McFarland*, 6 Barr, 478.

The wisdom and propriety of the rule thus established are very clearly and forcibly illustrated by the present case, in which it is settled by the verdict, that the actual line claimed by the plaintiff was located, laid out, assented to and adopted by the parties, as the dividing line and north line of the Indian reserve. No actual survey and location of the reserve is now produced, but some deeds and other instruments are produced, made at a somewhat later period, alluding to such survey. But however the actual line was established, it was, in fact, actually established by the parties, and to their satisfaction, and so remains to the present time, undisturbed, a century and a quarter from the date of the original deed. It must also be constantly borne in mind, that this was not the line of a single lot, but a line of a large territory of eight or ten or more miles in extent. There are various grants and conveyances and acts of the legislature during this long period, conforming to this actual existing line. The strongest reasons of propriety and policy, as well as the principles of law, forbid that such a line, thus established, should be disturbed after

having been established and conformed to for such a length of time. The length of this well known and ancient line renders it a matter of public and general concernment, that it should remain undisturbed. What would be the consequences of breaking up a line of this extent, and of this antiquity, to which grants and conveyances and acts of the legislature have conformed, it is impossible now to foresee. The only objection now made to the actual existing line is, that it does not exactly correspond with the points of compass as given in the original Indian deed. Probably the lines, as actually established, of a large portion of the estates in the commonwealth would be found to vary more or less from the points of compass as given in the original deeds. Variation of the compass, imperfection of the instrument, unskilfulness in the use of it, roughness of surface, and other causes, inevitably produce, in every instance, more or less uncertainty of result. Whether or not the parties intended to establish the line in this case, precisely according to the points of compass, as given in the original deed, does not appear. But it does appear, and has been settled by the verdict, that they did in fact establish a line satisfactory to themselves, which has remained unquestioned down to the present time, and no sufficient reason has been shown by the defendants why it should be now destroyed. The parties in interest themselves marked out on the earth's surface, where they would have the line mentioned in the deed, and there it must be; and with that line, those claiming under them, and coming more than a century after them, must be content.

The court are fully satisfied that, both on principle and authority, the instructions given to the jury were correct, and that judgment must be rendered on the verdict.

EDMUND SOUTHWICK vs. TRUMAN ESTES.

A master is responsible for the negligent acts of his servants, done within the general scope of their employment, although contrary to his express orders, if not done in wilful disregard of those orders.

THIS was an action on the case for injury to the land of the plaintiff, situated on the south side of the north branch of the Hoosac River, and bounded northerly on the line on the south bank of the stream where the land and water coincide, when the stream is at its usual, ordinary and natural height. The defendant owned the land north of this line; he managed his estate through the agency of one Evenal Estes, who was from time to time engaged, with sundry laborers employed by him, in removing stones and other obstructions from the bed of the stream; and the stones thus removed were placed on the north bank of the river. The plaintiff introduced evidence to show that on one or more occasions the laborers so employed had entered upon the land of the plaintiff, or had removed stones or earth that were attached to the same, and displaced some of his soil.

The defendant, not admitting these facts to be proved, contended that if they were as above stated, yet he was not liable therefor, inasmuch as said Evenal had testified that if he and his workmen passed over the defendant's line and entered upon the land of the plaintiff, it was against the defendant's directions given to them while thus employed; and requested the court so to instruct the jury.

But *Dewey, J.*, before whom the case was tried, instructed the jury on this point, that if the servants of the defendant had done such acts while in his service, and the acts done were within the general course of business and scope of employment, in which they were employed by him; and although directed to remove stones or earth within the defendant's southern boundary line, yet if they, when thus employed, negligently passed over the limits thus pointed out by the master, being at the time employed to remove stones, and

transport them to the north bank of the stream; and had thus removed stones from the plaintiff's bank, and carried them to the defendant's bank on the opposite side of the river, and there deposited them for a wall or embankment, the master was liable in this action; but that if the acts of the servants were not done negligently, but wilfully, and with the intention of disregarding the directions of the master, he would not be responsible therefor.

The jury returned a verdict for the plaintiff, and the case was reported for the consideration of the whole court.

H. L. Dawes, for the defendant. A master cannot be held liable for the tortious acts of his servants, committed against his express directions, merely because they were not done wilfully. Bro. Ab. Trespass, 435, 2 Rol. Ab. 553, and Noy's Maxims, c. 44, as cited in *McManus v. Crickett*, 1 East, 107; *Middleton v. Fowler*, 1 Salk. 282; 3 Steph. N. P. 2340; Story on Agency, § 456.

T. Robinson, for the plaintiff.

SHAW, C. J. The distinction between the liability of the master, for the negligent acts of his servants, and that resulting from their wilful and designed tortious acts, appears to have been carefully made and correctly stated in the charge of the judge. *McManus v. Crickett*, 1 East, 106. A servant may do great damage to another person, in the negligent and careless performance of his master's service, though against the master's will and contrary to his orders; yet this is a ground of action against the master. [14 How. 468.]

Judgment on the verdict.

ELISHA PECK & another vs. LEMUEL H. FISHER.

Real estate, conveyed to and held by partners as tenants in common, though purchased by them with partnership funds, and for the partnership use, is to be considered at law as the several property of the individual partners and liable to

Peck. & another v. Fisher.

be levied on for their separate debts; but if so taken, it will be held by the creditor in trust, to be applied, so far as may be necessary, to the payment of the partnership debts.

B. and C. were partners under the firm of B. & C., and also copartners with A., under the firm of A. B. & C. The demandant, a partnership creditor of the firm of A. B. & C., having attached and levied on the real estate of B. & C., purchased by them with their partnership funds and for their partnership use, but held by them as tenants in common, the same was subsequently attached and levied on by the tenant, who was a creditor of the firm of B. & C., as their partnership property and the demandant brought his writ of entry to recover the same; it was held, that the demandant, by his previous attachment and levy, acquired the better title at law to the demanded premises, and was entitled to judgment; but as a suit in equity was pending to subject the same to the partnership debts of B. & C., judgment was suspended to await the result of that suit.

In this case, which was argued by *I. Sumner* and *J. E. Field*, for the demandants, and by *W. Porter* and *F. Chamberlain*, for the tenant, the material facts are sufficiently stated in the opinion of the court, which was read at September term 1852,* as drawn up by

FLETCHER, J. This is a writ of entry. Both parties claim to have a title to the demanded premises derived from Lewis Beach and James H. Royce, who were partners in business under the firm of Beach & Royce.

• It appears from the evidence, that the demanded premises were purchased by the firm of Beach & Royce, with their partnership funds, for partnership purposes, and had always been used by the firm for partnership purposes, and that the profits thereof had accrued to the partnership estate of the firm of Beach & Royce. It also appears, that Beach & Royce were copartners with John Z. Goodrich in another distinct and independent firm, composed of John Z. Goodrich, Lewis Beach, and James H. Royce, doing business under the name and firm of Goodrich, Beach & Royce.

The demandants in this suit were the creditors of this latter firm of Goodrich, Beach & Royce, and to secure their claim sued out a writ of attachment against the firm, and on the 14th of July, 1848, duly attached the demanded premises, the title to which was in Beach & Royce as before stated. This suit duly proceeded to judgment, which was rendered on the 25th of April, 1849; and on the next day, the 26th of the same

April, execution was issued on the judgment, which was on the same 26th of April, levied on the demanded premises, then belonging to Beach & Royce as aforesaid, which were duly set off to the demandants, on the execution, and the same never having been redeemed, the demandants claim a title thereto, under and by virtue of this levy and setting off to them on their execution against Goodrich, Beach & Royce. This constitutes the demandants' title, upon which they seek to recover the demanded premises in this suit.

To meet this title of the demandants, the tenant, who was a creditor of the separate firm of Beach & Royce, set up a title in himself to the demanded premises; first, under a mortgage thereof, executed to him by Beach & Royce, on the 9th of November, 1848, to secure the payment of their debt to him; and second, under an attachment made on the 26th of May, 1849, on a writ sued out by him against Beach & Royce, which proceeded to judgment, upon which execution was issued, and levied on the demanded premises, which were duly set off to him.

It is maintained, for the tenant, that though the mortgage to him and his attachment, were subsequent, in point of time, to the demandants' attachment, yet that the tenant has the better title, because his debt was against the firm of Beach & Royce, to whom the estate belonged; whereas the demandants were the creditors of the firm of Goodrich, Beach & Royce, of which Beach & Royce were individual members, and the demandants levied on the demanded premises, therefore, as the individual property of Beach & Royce. The ground on which the tenant rests his title is, that the demanded premises were the partnership property of the firm of Beach & Royce; that by law the partnership property must first be applied to the payment of partnership debts; that his was a partnership debt of the firm of Beach & Royce; and that therefore his title, though subsequent in time, will take precedence of the prior attachment of the demandants, as their debt was not a partnership debt of the firm of Beach & Royce.

The debt, for which the tenant made his attachment, and

for which the demanded premises were set off to him, is understood to be the same secured by the mortgage to him. Whether Beach & Royce could convey the land after the demandants' attachment, and whether the tenant can set up his mortgage after the mortgaged premises have been set off to him on execution to satisfy the mortgage debt, and whether the tenant's attachment was not too late to avail him, even on his own principles, being after the demandants' debt was satisfied by setting off the demanded premises on their execution, are questions which need not now be considered.

It appears from the evidence that Beach & Royce, at the time the demandants' attachment was made, were insolvent, and have continued to be insolvent and unable to pay their partnership debts. The question therefore now is, whether the tenant has the better title, on the ground that the demanded premises were the partnership property of the firm of Beach & Royce, and must be applied in payment of their partnership debt to the tenant, in preference to the debt of the demandants, which was not a partnership debt of the firm of Beach & Royce.

It is, no doubt, a well established principle of law, that partnership stock and property, consisting of personal estate, must first be applied to the payment of partnership debts, and therefore that an attachment of such partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property, for the debt of one of the partners; it being considered that the real and actual interest of each partner in such partnership stock is the net balance, which will be coming to him, after payment of all the partnership debts and a just settlement of the account between himself and his partner.

The inquiry now is, whether the present case comes within this general principle as to personal property, that is to say, whether real estate purchased by partners for the partnership business, paid for out of the partnership funds, and used for partnership purposes, under a deed in common form, conveying the same to them by their several names—such a deed as would ordinarily make them tenants in common—should be

considered as partnership stock, or as estate held in common, and not in joint tenancy, so far as the legal title is in question.

It must be kept constantly in mind, that the question, raised in the present case, is wholly in regard to the legal title to the estate, and not in regard to any trust or equitable interest.

The rules and principles, by which partners hold real estate purchased by them with partnership funds, and for partnership purposes, have been much considered in England and in the various states of the United States, and there are various decisions on the subject. It is quite unnecessary, and would be wholly unprofitable, to go into any extended discussion of the general subject; as the various cases, in which it has been largely discussed, have been fully collected, and the results of the decisions clearly stated, in several elementary works. 3 Kent Com. (6th ed.) 38, and notes; Collyer on Partn. §§ 136, 156 and notes.

The law upon this subject, in this commonwealth, must be regarded as fully settled by the recent decisions of this court. *Goodwin v. Richardson*, 11 Mass. 469; *Burnside v. Merrick*, 4 Met. 537; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest*, 5 Met. 582. Nothing more can be necessary for the decision of the present case, than simply a statement of the doctrine as established by these adjudged cases. The result of the decisions in this court is, that real estate purchased by partners, with the partnership funds, for partnership use and convenience, and conveyed to them in such manner as to make them tenants in common, must be considered, at law, as the several property of the partners, as tenants in common; and must be dealt with in this court, as a court of law, according to the legal title, as the several property of the partners, as tenants in common, and not as partnership property of the partners, as joint tenants; yet that it will be considered and treated in equity, as so held as the several property of the partners, as tenants in common, subject to a trust arising by implication of law, by which it is liable to be applied, if necessary, to the payment of the partnership debts; and that neither it nor its proceeds can be held by the separate owner, except to the extent of his interest in any balance, if any there be, on a final settlement of partnership accounts.

Upon these principles, as this is a suit at law, to be disposed of according to the principles of law; and as, at law, Beach & Royce must be regarded as tenants in common, and as their separate estates in the land were liable to be taken for their separate debts, and as the demandants' attachment was prior in time; the demandants, at law, have acquired the better title and are at law entitled to judgment. But as in equity a different disposition of the property may be made, and as it is understood that a suit in equity is pending, the judgment in this case will be suspended to await the result of the suit in equity.

CONSTANT SOUTHWORTH vs. SILAS SMITH.

Where a party designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object, that no tender was made.

If A., the purchaser of real estate at a sale on execution, when B., a purchaser of the debtor's right to redeem, attempts to make him a tender of the money due, is absent from home by necessity or other cause, and without any intention to evade a tender, and in consequence of such absence, and by the use of due diligence, B. is unable to find A., or any person authorized to act in his behalf, and is thereby prevented from making the tender seasonably, no forfeiture of the estate is thereby incurred; and, in such case, it is not necessary that there should be a precise and accurate count of the money, provided B. was prepared to make the tender; or that B. should offer the money to any one, or leave it where A. could control it; or that A. should know that B. had the right to redeem from the sheriff's sale, provided B., when he goes to make the tender, produces his deed, and declares that he stands in the place of the debtor.

This was a writ of entry, to recover certain lands in Great Barrington, and was tried before *Dewey, J.*, whose report thereof was as follows:

On the 27th of May, 1848, Smith, the tenant, purchased one Benjamin Cole's equity of redemption of the lands described in the writ, under a sheriff's sale on an execution in his favor against Cole. The demandant, on the 24th of May, 1849, purchased Cole's right in equity to redeem the said equity of

redemption from the sale on execution; and on the same day, went to Smith's house with the money required to redeem the estate, and was informed by the family, that Smith had gone to the state of Connecticut. Two days after, he went again to Smith's house, in company with two witnesses; and on inquiry for Smith, was informed by his family that he had not returned from Connecticut. The demandant then asked Smith's son, if there was any person authorized to receive the money due to Smith, upon his purchase of the equity, and offered it to any one authorized to receive it; and was told that there was no one. He then and there stated that he had a deed of Cole's right to redeem and stood in his room, and exhibited his deed. He then put the money upon the table, and the witnesses, as one of them testified, counted the same; one of them counted about two thirds of the money, and the other counted the rest; and the first counted over about half of the part counted by the second. It was then stated to the family, that the demandant's purpose, in coming there, was to tender the amount due to Smith. The money was taken back by Southworth, and carried and deposited in the Mahaiwee Bank; and upon the entry of this action, was brought into court and left there, ready for Smith. The question was left to the jury, whether Smith, on the 24th, 25th, 26th; and 27th of May, designedly absented himself from home, to prevent a tender; and they found that he did.

The defendant contended, that, upon the foregoing facts, this writ of entry was not the proper remedy; that the action could not be maintained; and that the tender was insufficient in law. The court are to enter such judgment as may be proper.

I. Sumner, for the demandant, cited *Allshouse v. Ramsay*, 6 Whart. 331; *Blight v. Ashley*, Peters C. C. 15, 24; 2 Greenl. Ev. § 603; *Bingham v. Allport*, 1 Nev. & Man. 398; 2 Bouvier Law Dict. Tender, and authorities there cited; *Kemble v. Wallis*, 10 Wend. 374; *Coit v. Houston*, 3 Johns. Cas. 243; *Warren v. Mains*, 7 Johns. 476.

C. N. Emerson, for the tenant, cited Bac. Ab. Tender, &c. B; 3 Steph. N. P. 2604; *Ryder v. Townsend*, 7 Dowl. & Ryl. 119.

BIGELOW, J. The jury having found by their verdict in this case, that the tenant designedly absented himself from home, for the fraudulent purpose of avoiding the demandant's tender, the tenant cannot now be permitted to set up, as a defence to this action, that no tender was made. The law does not allow a party to defeat another's rights by fraud.

But even if the tenant had not purposely avoided, and had been absent from home from necessity or other causes, with no intention to evade a tender, and in consequence of such absence, the demandant, by the use of due diligence, was unable to find the tenant, or any person authorized to act in his behalf, and was thereby prevented from making the tender seasonably, no forfeiture of the estate would be incurred. The demandant has shown a readiness and due effort on his part to perform the legal duty required of him, and a failure to accomplish it through no fault on his part, but because the act of the tenant had put it out of his power. *Lex non cogit ad vana seu impossibilia.* *Borden v. Borden*, 5 Mass. 67, 74; *Gilmore v. Holl*, 4 Pick. 258, 264; *Tasker v. Bartlett*, 5 Cush. 359.

It was urged as an objection, that the demandant had not done all that was necessary, because it did not appear that the money was counted, or its amount accurately ascertained. But the evidence, as reported, is amply sufficient to warrant a jury in drawing the inference, that the demandant was prepared to make the tender; that he went to the tenant's house for that purpose, in company with two witnesses; and that the money was there produced and counted. But, without this evidence, it is enough for the demandant to show, in the absence of the tenant, and of any agent authorized to receive the tender, his readiness to make it, without proving a precise and accurate count of the money. The same reason which excuses a tender is a sufficient answer to this objection.

Nor can it be reasonably contended, upon the evidence in this case, that it was the duty of the demandant to offer the money to any one, or to leave it where the tenant could control it. He was distinctly informed that the tenant was absent from the state, and that no one was authorized to receive the

Inhabitants of Monterey v. County Commissioners of Berkshire.

money in his behalf. We know of no principle of law which requires a party, under such circumstances, to put a large sum of money out of his own hands, into the possession of an unauthorized person, and thus unnecessarily incur the risk of its loss through accident or fraud.

It was also urged by the counsel for the tenant, that the tenant did not know that the demandant had the right to recover the premises, and was not, therefore, bound to be in readiness to receive the money from him. But it appears by the evidence, that the demandant, when he went to make the tender, produced his deed of the demanded premises, and stated that he stood in the place of Cole, the original owner of the right of redemption. Now, the tenant well knew that the right to redeem this estate was still outstanding; and he must be supposed to have known that this right was an interest in real estate, which could be legally conveyed. It could make no difference to him or his rights, whether his money was paid by one person or another, and he was legally bound to receive it from him to whom the right to redeem belonged. It was therefore sufficient to show that the demandant claimed this right, produced his deed thereof from the original owner, and was ready to pay the money due.

The objection to the form of action being waived, the exceptions are overruled, and judgment is to be rendered on the verdict, for the demandant.

THE INHABITANTS OF MONTEREY vs. THE COUNTY COMMISSIONERS OF BERKSHIRE.

The authority conferred upon selectmen by the Rev. Sts. c. 24, § 66, to lay out town ways for the use of their respective towns, is limited to roads having their *termini* within the town; but it is no objection to such laying out, that the road is intended as one link in a chain of continuous roads; that it is for the convenience of the inhabitants only from its connection with some great thoroughfare; and that when established, it will be for the use of the public generally, as well as of the inhabitants of the town in which it is situated; and if selectmen un-

Inhabitants of Monterey v. County Commissioners of Berkshire.

reasonably neglect or refuse to lay out such way, the county commissioners may lay out the same, under the appellate jurisdiction conferred upon them by the Rev. Sts. c. 24, § 71.

A petition to the selectmen of M. to lay out a way, having described the same as commencing at a point in the town of M. and extending "to the line of N.," and the county commissioners, upon the refusal of the selectmen, having laid out the same, describing it as beginning at a certain point within the town of M. and "terminating at a stake in the line dividing M. from N.;" it was held, that there was nothing, either in the petition or in the location, to show that the road was not within the jurisdiction of the selectmen to lay out.

Whether a town way, for the laying out of which application is made to the county commissioners, on the refusal of the selectmen to lay it out, is for the use of the town within which it is situated, is a question exclusively within the discretion of the commissioners to decide.

Where an order of county commissioners, passed in January, 1849, directed a town to make a certain road, by the first of October then next, and also not to commence the work until the time (one year) for applying for a jury to change the location had passed; and the commissioners, in May, 1850, (the road not having been made,) passed an order for the making and completion thereof, by the first of September then next; it was held, that whether the first order was nugatory and void or not, the second order was valid; and that it was no objection to the last order, that the first was erroneously cited therein as having been passed in January, 1848, instead of January, 1849, the error being merely clerical, and it being apparent, that the petitioners were not misled thereby.

A county commissioner is not disqualified by the Rev. Sts. c. 14, § 26, to act in the laying out of a road, by reason of being an inhabitant of a town to the line of which the road in question extends, and with a road in which it is intended to connect.

Where an application to county commissioners to lay out a town way, on the refusal of selectmen to lay out the same, did not allege that they "unreasonably" neglected and refused to do so; but the town appeared and were heard, without any objection to the omission, and the commissioners stated in their adjudication, that the selectmen "unreasonably" refused to lay out the road; it was held, that the error was merely one of form, and no ground for issuing a *certiorari*.

The provisions of St. 1848, c. 192, requiring county commissioners and the authorities of cities and towns to cause stone bounds or other monuments to be erected at the *termini* and angles of all roads laid out by them, are merely directory, and not necessary to be complied with, in order to a valid location; they more properly relate to acts to be done after the way is located; and compliance therewith need not be stated on the record of the laying out of the road.

THIS was a petition for a *certiorari* to the county commissioners of Berkshire, to certify the record of their proceedings in the laying out and establishment of a highway in Monterey. From the petition, and other papers in the case, the following facts appeared:

Inhabitants of Monterey v. County Commissioners of Berkshire.

Egbert B. Garfield and others, on the 21st of June, 1848, presented the following petition to the county commissioners for this county: "The undersigned, inhabitants of the town of Monterey, would represent that they have petitioned the selectmen of that town, to lay out a town road and locate the same, commencing not far from the stone bridge east of the dwelling house of Egbert B. Garfield, thence down the stream to the line of New Marlborough: That the selectmen have neglected and refused to lay out said road, except on condition of all damage being relinquished: We therefore request you to view said route, and lay out and locate said road, if advisable: That, on the nineteenth instant, the selectmen aforesaid viewed said route and refused to locate the same."

Upon this application, and after due notice thereof had been given, the commissioners met and viewed the proposed route, and heard the parties, on the 24th of August, 1848, and thereupon adjourned the meeting to their session at Lenox, held on the first Tuesday of September following, at which they adjudged and determined that the selectmen of Monterey did "unreasonably refuse and neglect" to lay out the town road as prayed for in the said petition; that the petitioners, having complied with all the provisions of the statute, had "fully brought the case within the jurisdiction of the county commissioners;" and that "the board will proceed accordingly, under a new notice, to locate the said town way as prayed for by the petitioners."

The commissioners thereupon, at their January session, 1849, proceeded after due notice, to lay out the road: "Beginning at a stake near the centre of the travelled road, bearing north 74° east from the chimney of E. B. Garfield's dwelling house," by certain courses and distances, "to a stake in the line dividing Monterey from New Marlborough." The town of Monterey were directed to make the road by the 1st of October, 1849, and at their own expense. They were directed also not to break ground, until the right to a jury to change the location should have passed.

The commissioners subsequently, on the 24th of May, 1850, passed the following order:

Inhabitants of Monterey v. County Commissioners of Berkshire.

"Whereas, at their January session, A. D. 1848, the county commissioners of Berkshire county, did locate and establish a town road in the town of Monterey in said county, on the petition of E. B. Garfield and others; and whereas in their order of said date to the town of Monterey, the county commissioners required said town of Monterey to build said road within the period of time allowed by the statute for the calling of a jury to change the location; and whereas the period of time allowed by the statute for the calling of such jury has now passed: It is hereby ordered that the town of Monterey do now proceed to build said road, and that the same be completed by the 1st day of September next, in accordance with the directions for making, contained in the order before named of January, 1848, and that all owners of lands, over which said road is located, have until the 1st day of July next, to remove all timber, trees and other things thereon."

The petitioners prayed that a writ, of *certiorari* might be issued to the commissioners, for the following reasons:

"1. Because the selectmen of the town of Monterey did not 'neglect and refuse' to lay said road as a town road 'unreasonably,' as represented to said commissioners, for the reason that the said road prayed for by said Garfield and others, was emphatically a road leading from town to town, and depending entirely for its convenience, necessity and utility, upon a road laid or to be laid in the town of New Marlboro', and not to be built by said New Marlboro' unless the said town of Monterey should build its part of said road prayed for, lying within its limits; the said inhabitants therefore say that the road, prayed for by E. B. Garfield and others, was not and is not such a road as the selectmen of Monterey were authorized and empowered to lay, by the 66th section of chapter 24 of the revised statutes. The refusal therefore of said selectmen to lay a road which they were not authorized to lay by the statute, would found no jurisdiction whereby the said county commissioners could act in the premises, and proceed to lay out and establish the same as contemplated in the 71st section of the 24th chapter of the revised statutes. It appears from the records of said commissioners laying out said road, that they began at a stake near the centre of the travelled road bearing north 74° east from the chimney of E. B. Garfield's dwelling house, and north 94° west from the chimney of said Garfield's hall house, (so called,) thence south running various courses and distances to a stake in the line dividing Monterey from New Marlboro', not connecting with any open road in said New Marlboro', nor near any open road; they therefore, the inhabitants of Monterey, petitioners as aforesaid, say that under no circumstances could it be said that the said selectmen had unreasonably neglected and refused to lay out said road, or a town road or town way; but that the record of said commissioners shows, as well as the evidence presented to them and to said selectmen shows, (if it shows any necessity or convenience for a road such as prayed for,) a necessity for a highway or county way leading from one town to another town, for the use and convenience of the inhabitants of the towns of New Marlboro' and Monterey, respectively, and for all the inhabitants in said county, as contemplated in the statutes; yet in despite of the insufficiency under the statutes of the representation in the petition of said Garfield and others, in regard to the action of said selectmen touching said road, the said commissioners have, as these petitioners believe, illegally and improperly assumed jurisdiction in the premises, and laid out the said road as a town road, and ordered the town of Monterey to build the same, at a most ruinous expense to the inhabitants thereof.

Inhabitants of Monterey v. County Commissioners of Berkshire.

"2. Because the said commissioners, by their order of January 3d, 1849, directed the said town of Monterey to make said road 'by the 1st day of October, A. D., 1849, and at its own expense,' being three months before the time allowed by the statute for calling a jury to change the location of said road had expired, and by the same order directed the town 'not to break ground until the right to a jury to change the location shall have passed,' which time would not have passed until the 3d day of January, 1850, thus rendering said order utterly nugatory and absurd; or if it could have any rational or consistent construction, it must be construed to mean that the town proceed to build the road when the right to call a jury to change the location had passed, to wit, on the 3d day of January, 1850, in the middle of winter, thereby depriving the town of their right to build said road under the statute, by requiring it to perform an impossibility; yet the said commissioners proceed in the month of April, 1850, to let and contract for the building of said road, on the ground of a neglect and refusal on the part of the town to build the same.

"3. Because the said commissioners have utterly disregarded the act of 1848, chapter 192, relating to town and county roads, as appears by their record touching the laying out of said road, inasmuch as they have erected no bounds at the *termini* and angles of said road as required by that statute, which it was entirely practicable for them to do; nor have they made any heap of stone, or living tree, or permanent rock, or corner of an edifice a substitute for said stones at the *termini* and angles of the same, but, on the contrary, have made their survey and placed all their monuments and bounds upon the centre of said road.

"4. Because the said commissioners, long after the expiration of the time for calling a jury to change the location of said road, and without the intervention of a jury for that purpose, as contemplated in the statute, and after they had contracted for the building of the same, on the ground of refusal on the part of the town to build said road according to their directions, and after the subject matter of said road had been continued from time to time by said commissioners, for construction, and for that purpose only, the said commissioners proceed on the 24th day of May, 1850, illegally and improperly to issue some sort of order of that date to said town of Monterey, to build a road according to directions for making contained in an order of January, 1848, no such order ever having been served upon said town of Monterey, which said order is uncertain, illegal and void.

"5. Because Seth Norton, one of said county commissioners, assumed to act and did act in the view of the premises, and in the determination of the question of 'neglect and refusal' of the selectmen of Monterey, as represented in the petition of Garfield and others, as well as in the determination of the question of common convenience and necessity of said road, and in the location thereof, he being, at the time of such action and adjudication in regard to said road, and now, a resident of the town of New Marlboro', where a part and parcel of the said road was to meet and connect with another portion of road leading to Hartsville, in said town of New Marlboro', and laid by the selectmen of New Marlboro', and accepted by said town, and to be built only upon the condition 'that the town of Tyringham (now Monterey) lay a road to meet the same, or one is built by the county commissioners to meet the same;' thus the said Norton having a direct interest in the laying of the said road, in said Monterey, without which the road in said New Marlboro' could be of no sort of use or convenience to the inhabitants of New Marlboro', nor could the road in said Monterey be of any sort of convenience or utility to the inhabit

Inhabitants of Monterey v. County Commissioners of Berkshire.

ants of Monterey, without the connection aforesaid; yet the said Norton well knowing the premises, as well as the board of commissioners, of which he formed a part, proceed and lay said road contrary to the 26th section of chapter 14th of the Revised Statutes; and the said Norton had a further bias and interest in laying said road in Monterey, having laid that part of the road in New Marlboro' as a selectman of that town; yet a board of disinterested commissioners might have been formed without said Norton, by substituting one of the special commissioners in his place."

J. Branning, for the petitioners.

I. Sumner, for the respondents.

DEWEY, J. This is a petition for a *certiorari* to the county commissioners of this county. The ground of the application is an alleged irregularity in the proceedings of the county commissioners, in establishing and locating a certain road in the town of Monterey. The leading objection taken to these proceedings, in the argument in support of the motion for a *certiorari*, is the want of jurisdiction on the part of the county commissioners to act in this matter. The jurisdiction assumed by them was wholly an appellate, and not an original jurisdiction.

It was urged by the counsel for the petitioners, that this road was of such a character as made it a public highway, so far as to require it to be laid out by the county commissioners only upon an original application to them, and not by appeal from the action of the board of selectmen, refusing to lay out the road. This leads us to consider the jurisdiction of county commissioners, in relation to roads, both as to original jurisdiction, and on appeal from the refusal of selectmen; and the authority of selectmen in relation to town ways. The original jurisdiction, as to establishing ways, is vested in the county commissioners by the Rev. Sts. c. 24, § 1, which gives them the power to lay out public highways, or county roads, as they are sometimes called, in distinction from town ways, though such public ways may be either roads leading from town to town, or from place to place, within the same town. In either case, the county commissioners have original jurisdiction. By the Rev. Sts. c. 24, § 66, it is also provided, that the selectmen of the several towns may lay out town ways "for the use of their respective towns."

It is quite obvious, that the distinctive character of a road,

as a town way, or a public highway, must, to some extent, be indicated by the manner of its creation, or the power which gives it a legal existence. As already stated, the county commissioners have not only authority to lay out highways from town to town, that is, passing through various towns, but also highways, the *termini* of which are exclusively within the same town. Hence, to some extent, local roads may be either town ways, or public highways. So also a town road may be a road of great public travel, from its connection with other roads. The only criterion, therefore, for distinguishing between these different species of roads, is to ascertain whether the proceedings for their location originated with the selectmen; or with the county commissioners. If with the former, they must be town ways, as the jurisdiction of the selectmen is confined to such ways.

The power vested by the statute in these two tribunals is essentially different. The authority vested in the selectmen is a more restricted power, and one limited to roads having their *termini* within the town. With this limitation, the selectmen are authorized, in their discretion, to locate any road within their respective towns, for the use of the inhabitants. They are to act in the matter according to their own judgment, subject only to the restriction just named, and the approval of the town, if the selectmen decide in favor of such a location; and the county commissioners, in case of unreasonable neglect or refusal of the selectmen to lay out a way, or of the town to accept the same, have the like discretion and power to adjudicate, on an appeal to them, as to the road being one required for the convenience of the inhabitants of the town in which it is to be located.

It by no means follows, from the limitation of town ways to ways for the use of their respective towns, that such a way may not be used as a link in a chain of continuous roads of great public travel. The convenience of the inhabitants of the town may require the establishment of the road because of its direct connection with some great thoroughfare; and when thus established, it is open to the use of the public generally, as well the inhabitants of other towns as those of

the town in which it is situated. The legislature has vested this power to lay out roads in these tribunals, and has seen fit and proper to clothe them with discretionary powers of a somewhat extended character, and such as we have neither the power nor the disposition to interfere with.

The inquiry is then, whether, upon the facts stated in the present case, the county commissioners have exceeded their jurisdiction; and this, it will be perceived, depends upon the decision of another question, namely, whether the application to the selectmen of Monterey, to lay out and establish this road, was one cognizable by the selectmen. The action of the county commissioners was not upon an original application, but under the appellate power given in *Rev. Sts. c. 24, § 71*. It is not enough, therefore, for the respondents to show that the county commissioners might have original jurisdiction of the matter of laying out this road. The petitioners for the same elected to apply to the selectmen to lay out the road as a town road, and it is only as such town road that the county commissioners have established it. If, therefore, this was not a road that could be legally laid out by the selectmen of Monterey, the whole proceeding was irregular, and ought to be quashed.

Does the application to the selectmen indicate a road of such a character as was beyond the scope of the authority of the selectmen to lay out? In the petition, it is called a town road, and is described as commencing "not far from a stone bridge, east of the dwelling-house of Egbert B. Garfield, thence down the stream to the line of New Marlborough." In the location by the commissioners, it is described as a town way, beginning at a certain point, "within the town of Monterey, and terminating at a stake on the line dividing Monterey from New Marlborough." There is nothing on the face of this location, or in the petition for laying out the road, that implies that it is to be a road from town to town, in the sense that would require an original application to the county commissioners to lay out the same; it is wholly within the territorial limits of Monterey; and, so far as is apparent on the record, might be properly located as a town road.

But the petitioners for a *certiorari* now urge that, in point of fact, the road was required principally for the use of others than the inhabitants of Monterey. That, however, was a question exclusively for the county commissioners; and we should be slow to interfere with the doings of inferior tribunals, in a case where the question before them is one exclusively within their discretion and judgment, as to the convenience or necessity of the road. They are the tribunal, constituted by law, to decide whether the road is wanted for the use of the inhabitants of Monterey; and having proceeded to establish and locate this road, as a town road, upon an appeal from the selectmen, they must have found that fact. This objection cannot therefore avail the petitioners.

It is then further objected, that these proceedings ought to be quashed, because the first order of the commissioners for constructing the road was objectionable, inasmuch as the order was rendered a nugatory one, as to the time fixed for its construction, by further requiring the town of Monterey to postpone the time of the commencement of the work, until the period had elapsed for calling out a jury. However fatal this objection might be, as respects the first order for the construction of the road, it is now entirely immaterial, as the commissioners subsequently, in May, 1850, made a new order for the same to be completed by the 1st of September, 1850, and this order was free from any restriction. This properly imposed the duty upon Monterey to make the road, and removes all further difficulty as to the first order, unless an objection taken to the second order is fatal to that order. It is objected, that it recites the adjudication establishing the road as adopted, "January, 1848," whereas it was adopted, "January, 1849." This was a mere clerical error, and, unless the petitioners were misled thereby, cannot avail them. That they really understood the order, must be apparent from their connection with the subject, during the various proceedings thereon, as well as from the other parts of the recital, stating the road to be the same that was laid out on the petition of Egbert B. Garfield. In our opinion, this defect is no sufficient ground for quashing these proceedings.

Inhabitants of Monterey v. County Commissioners of Berkshire.

It is next objected, that Seth Norton, one of the commissioners acting in the laying out and establishing of this road, was interested, by reason of his being an inhabitant of New Marlborough. But this road was wholly within the limits of Monterey, and therefore no such objection exists for this cause. The fact, that the road extended to the line of New Marlborough, did not render Norton incompetent to act in the case, and require a special commissioner to be substituted in his place.

A question was also raised at the argument, as to a supposed defect in the original petition to the county commissioners. This was not assigned in the application for the *certiorari*, as a cause for granting the same. The defect now suggested is the omission of the word "unreasonably" in the representation to the county commissioners, that the selectmen of Monterey had neglected and refused to lay out the town way asked for by Egbert B. Garfield and others. It is true, that the statute only authorizes an appeal to the county commissioners, when "the selectmen shall have unreasonably neglected or refused to lay out" the road. But no particular form of application to the county commissioners is prescribed by the statute. The fact, that the selectmen have unreasonably neglected or refused, must be made to appear to the county commissioners; and, in the present case, it is directly found, and so stated in their adjudication establishing the road. The town of Monterey also appeared, and were heard before the commissioners on the case, without taking this objection. This obviated all substantial objection, and makes the objection one of mere form. But nothing save substantial errors, and such as would work manifest injustice, if not corrected, will be regarded in an application for a *certiorari*.

Another ground stated as a reason for issuing the *certiorari* is, that the county commissioners have disregarded the provision of the act of 1848, c. 192, requiring them to erect stone bounds, or, if this is impracticable, certain other prescribed monuments, at the *termini* and angles of all roads thereafter laid out by them. Various reasons may be given, why this ground cannot avail the petitioners: 1st. The provision in

question is merely directory, and does not enter into the essential elements of a good location of a highway. 2d. It is not required that the records should show the creation of such bounds or monuments; and, therefore, if a writ were to issue, and the records were to be brought before us, the omission of any recital of such acts in the record, would not invalidate the location of the road. 3d. These acts are more properly acts to be done after the road is finally located, and hence would not be stated as done, at the time when the record is made up of the original establishment and location of the road.

None of these grounds being sufficient to sustain this petition, it must be dismissed.

GRENVILLE D. WESTON vs. JOHN CHAMBERLIN.

If the first indorser of a promissory note, made payable to his order, is obliged to pay it, he may maintain an action for contribution against a subsequent indorser, on proving that, by an oral agreement between the indorsers at the time of indorsing the note, they were, as between themselves, co-sureties.

THIS was an action of assumpsit to recover of the defendant, as a co-surety, one third of the amount of a promissory note, which the plaintiff had been obliged to pay. By this note the Ashuelot Manufacturing Company as principals, and Henry Marsh, Bushrod Buck, and Abel Whiting, as sureties, jointly and severally promised to pay Grenville D. Weston or order, five thousand dollars and interest annually; and the note was indorsed "G. D. Weston, Henry Chamberlin, John Chamberlin."

At the trial in the court of common pleas, before Byington, J., the plaintiff offered to prove that the parties, whose names appeared on the note as indorsers, agreed between themselves, at the request of the Ashuelot Manufacturing

Weston v. Chamberlin.

Company; and in order to enable them to obtain a loan of \$5000 of one Willis, to indorse the note as co-sureties of said company, if Marsh, who was the agent of the company, would place certain securities in their hands for their joint benefit, and to indemnify them for their liability on the note; that the three indorsed the note at the same time; that the securities were deposited in the plaintiff's hands, to be held by him for their common benefit; that it was the understanding and agreement of the indorsers, at the time of the indorsement, that they should be liable one to the other as co-sureties on the note, and that the defendant had since made admissions to that effect, and had collected some of the proceeds of said securities, and appropriated them to his own use, and had always stated and claimed that he and the plaintiff and Henry Chamberlin were each entitled to one third part of said securities.

But the presiding judge, being of opinion that, as it appeared from the note that the plaintiff was first indorser thereon, the written contract was the proper evidence of the plaintiff's relation to the defendant and the other indorser, and that it was incompetent for him to prove by parol evidence that, in point of fact, he indorsed the note as co-surety with the defendant, because the effect thereof would be, to vary and control a written instrument by parol evidence, rejected the evidence; whereupon a verdict was returned for the defendant, and the plaintiff alleged exceptions.

E. Merwin, for the plaintiff.

J. Rockwell, for the defendant.

...METCALF, J. The court are of opinion that the evidence offered by the plaintiff was wrongly rejected. As between the defendant and the holders of the note, he was liable only as third indorser, after such proceedings had by them as are required by law to charge him in that relation. And the argument for him now is, that the relation between him and the plaintiff is to be ascertained from the note alone. But the authorities are decisive, that the plaintiff ought to have been permitted to prove that, as between him and the defendant, they were, by virtue of a collateral agreement, col-

sureties of the Ashuelot Manufacturing Company; although they were, as between themselves and the holders of the note, first and third indorsers. It is not a valid objection to such collateral agreement, that it was oral only. Proof of such oral collateral agreement does not contradict nor vary the written agreement. The two are distinct. *Phillips v. Preston*, 5 Howard, 278; *Harris v. Brooks*, 21 Pick. 195; *Carpenter v. King*, and *M'Gee v. Prouty*, 9 Met. 511, 547; 2 Amer. Lead. Cas. (1st ed.) 154, 164. *New trial ordered.*

HANNAH STILLS vs. PHINEAS HARMON.

An executor is not liable by the trustee process, as the trustee of the heir of a deceased legatee, for the amount of a legacy in his hands, which was due to the legatee at the time of his decease.

THIS was a writ of *scire facias* against the defendant, as the trustee of Marsh Stills, and was submitted to the court upon the following statement of facts:

John Stills, by his will, bequeathed thirty dollars to his son Marsh Stills, the principal defendant in the original suit, and one hundred dollars to his granddaughter Eliza Stills, payable in six years from his decease. The will was duly proved, and Phineas Harmon, the defendant, the executor named therein, appointed executor. After the death of John Stills, Eliza Stills died, leaving her father Marsh Stills her only heir at law. The legacies above mentioned became payable on or about the 6th of May, 1849; and a few days afterwards this trustee process was served on the defendant, who at that time had the legacies in his hands and possession as executor of John Stills. The defendant in his trustee's answer claimed the right to set off a note of Marsh Stills held by him, against an equal amount of the legacies. The court of common pleas disallowed this claim in set-off, and adjudged the defendant to be the trustee of Marsh Stills. The latter afterwards paid on execution the sum of sixty dollars and sixteen cents, being

Stills v. Harmon.

the balance due on the execution, after deducting the amount of his note held by Harmon. This writ of *scire facias* was then sued out returnable to the June term of the court of common pleas, 1850. The defendant, in his answer, claimed an allowance of the amount of the note in part satisfaction of the legacies, but the court disallowed it, and rendered judgment for the plaintiff, whereupon the defendant appealed.

If the court are of opinion that the defendant has no right to deduct the amount of the note held by him against Marsh Stills, the judgment is to be affirmed. But if the defendant has the right to deduct that amount, judgment is to be rendered for the balance, if any.

W. T. Filley, for the plaintiff.

J. C. Wolcott, for the defendant.

DEWEY, J. This is *scire facias* against the defendant as the alleged trustee of one Marsh Stills. The plaintiff seeks to charge the defendant, in his capacity of executor of the last will and testament of one John Stills, who, by his will, gave a legacy of thirty dollars to Marsh Stills, and also a legacy of one hundred dollars to Eliza Stills, the daughter of Marsh Stills. Eliza Stills died before the payment of the legacy to her, leaving her father Marsh Stills her sole heir at law. The case, as presented upon the points submitted at the argument, places the defence upon the ground of a set-off; the defendant holding in his private capacity a promissory note of hand against Marsh Stills, which he seeks to set off against the claim of John Stills for the legacies above named. This raised the question as to the right of setting off a private demand, held by an executor who might be sued as a trustee of a legatee under the will by a creditor of such legatee. But upon the facts stated in the case, there is another objection which is fatal to the maintenance of this action.

The right to summon an executor, as a trustee of those who are by the will made legatees, is wholly under the statute, independent of which no such process would lie against the executor. The statute provision is in Rev. Sts. c. 109, § 62, and is to this effect, viz., "Any legacy due from an executor, and any other goods, effects and credits, in the

hands of an executor, may be attached in his hands by the process of foreign attachment." As to the legacy to Marsh Stills of thirty dollars, that presents a case within the statute, and one in which the executor might be charged in the process of foreign attachment. But the principal question here, and indeed the only one upon which the *scire facias* can be maintained, is as to the legacy to Eliza Stills; a payment having been made by the defendant to the plaintiff upon his judgment against Marsh Stills to an amount exceeding the legacy to Marsh Stills.

In the opinion of the court, the legacy to Eliza Stills furnishes no ground for the process of foreign attachment by a creditor of Marsh Stills. The defendant is the executor of John Stills, and, as such executor, is not liable to Marsh Stills for a legacy to his daughter Eliza Stills, who died after her right to such legacy had accrued. It is not enough that Marsh Stills is the heir at law of Eliza Stills to authorize this action. Before any proceeding at law can be instituted against the executor of John Stills, for the legacy to Eliza Stills, administration on her estate must be taken by some one, and this legacy will be assets in the hands of her administrator, for distribution to her heirs at law, if not wanted to pay her debts. The legacy to Eliza Stills, therefore, furnishes no ground for charging the defendant; and the defendant, having paid on the judgment against the principal debtor, a sum greater than the legacy to him, cannot be further charged on this process. This renders it unnecessary to consider the question as to the right of the defendant to set off his private demand.

Judgment for the defendant.

ROBERT CAMPBELL vs. ENSIGN RACE.

A traveller on a highway, rendered impassable by a sudden and recent obstruction, may pass over the adjoining fields, so far as is necessary to avoid the obstruction, doing no unnecessary damage, without being guilty of a trespass.

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and

was tried in the court of common pleas, before *Byington, J.* The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence that at the time when the trespass was alleged to have been committed he was travelling with his team on a highway running east and west, which led to and intersected a highway running north and south, which latter highway led to and intersected another highway, on which the defendant had occasion to go with his team; and the usual, proper, and only mode of getting on which, by a highway, was by passing over the two highways first named, when they were in a condition fit for travel; but at the time of the alleged trespass, they were both obstructed, and rendered impassable by snow-drifts; because of which obstructions, the defendant turned out of the first highway with his team, at a place where it was rendered impassable as aforesaid, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and returned into the second highway, as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields, or that his so passing was excusable, and not a trespass.

But the judge ruled, that these facts constituted no defence to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

W. Porter and *J. C. Wolcott*, for the defendant, relied on most of the authorities cited in the opinion of the court.

I. Sumner, for the plaintiff. Our law allows of no such defence as is here set up. To justify or excuse a trespass, the strict rule of the common law applies, requiring inevitable necessity or unavoidable accident, neither of which existed in this case. *Hammond's N. P. 61 & seq.* The rule found in the English works, authorizing travellers to go *extra viam*, when the public ways are obstructed, was adopted because of the defective state of the law there in regard to compelling

repairs, and the consequent almost impassable condition of the roads. At common law, no action lies against a town for damages occasioned by defects in highways. *Mower v. Leicester*, 9 Mass. 247. The same reasons do not exist here. Rev. Sts. c. 24, §§ 11, 68; c. 25, §§ 3, 22, 24. And none of the American cases or text writers sustain the rule. See 2 Greenl. Ev. § 627; *Tisdale v. Norton*, 8 Met. 388, 391. The effect of establishing it, would be, to appropriate private property to a public use without compensation. Owners of lands grant to the public only an easement within the limits of the highway. They receive compensation for nothing else, except damage actually done to their remaining lands. Rev. Sts. c. 24, §§ 11, 68; *Commonwealth v. Norfolk*, 5 Mass. 435; *Commonwealth v. Coombs*, 2 Mass. 492. There is no right of way here, except by grant. "No necessity will justify an entry upon another's land." *Nichols v. Luce*, 24 Pick. 104.

The opinion was delivered at September term, 1852.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books. 2 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases. *Henn's Case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & S. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of *Taylor v. Whitehead*, *ubi supra*, which he says "is

the latest on the point, and *settles the law*." 3 Dane Ab. 258. And so Chancellor Kent states the rule. 3 Kent Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well settled law. *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in

exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway, is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing "this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional and temporary

use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable — of obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty four hours, and of which the towns have had no notice. Besides; the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property. *St. 1850, c. 5; Canning v. Williamstown*, 1 Cush. 451; *Harwood v. Lowell*, 4 Cush. 310; *Brailey v. Southborough*, 6 Cush. 141.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be con-

Tremain v. Edwards.

fined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained.

CHARLES J. TREMAIN vs. ABEL F. EDWARDS.

The plaintiff in an action of assumpsit on the common counts may recover for the board of the defendant and his servants.

Meals furnished to one and his servants, from day to day, are a proper subject of book charge.

In an action to recover for meals furnished to the defendant and his men, which the plaintiff was admitted to prove by his book account and suppletory oath, the plaintiff, having stated on his cross examination, that it was "only at the first time," that the defendant requested the plaintiff to furnish the meals; and having also stated in answer to a previous interrogatory, "that the defendant at the first requested that the meals should be furnished whenever they were there;" it was held, that the two answers should be taken together, and that they related to the future as well as the present.

THIS was an action of assumpsit on the common counts. At the trial in the court of common pleas, before *Byington, J.*, it appeared by the report of an auditor, to whom the case had

been referred; that the action was brought by the plaintiff, formerly the keeper of a hotel in North Adams, against the defendant, an engineer, for the board of himself and men, while surveying a route for a railroad. The plaintiff was allowed by the auditor to prove his demand by his book of account, containing his original entries, on which the meals supplied to the defendant and his men were charged from day to day, as they were furnished; supported by his supplementary oath.

The defendant objected before the auditor, 1st, that the particulars of the plaintiff's claim were of such a nature, that they could not be proved by the evidence of his book and oath; 2d, that the plaintiff having testified, on his cross examination, that the defendant "only at the first time" requested the plaintiff to furnish the meals, his testimony supported the first charge only; and 3d, that the plaintiff could not recover on the common counts. In reference to the second objection, it appeared, that the defendant had previously put an interrogatory to the plaintiff, to which he had answered; "that Edwards, at the first, requested that the meals should be furnished whenever they were there." All the objections were overruled by the auditor. In the court of common pleas, the same objections were taken and overruled; and the jury having returned a verdict for the plaintiff, the defendant excepted.

H. L. Daves, for the defendant.

T. Robinson, for the plaintiff.

DEWEY, J. 1. The court are of opinion that, under a declaration in *indebitatus assumpsit*, containing the common counts, for goods sold and delivered, labor and services done and performed, and money paid and expended, the plaintiff may recover for board furnished the defendant and his servants. *Witter v. Witter*, 10 Mass. 223.

2. It was objected that the account book of the plaintiff was not competent evidence, as, from the very nature of the case, there was better evidence to be derived from the persons whose board was the subject of the account. Generally speaking, the position is a sound one, that a sale of articles

delivered to third persons, cannot be proved by a book charge supported by the oath of the party. It would be so in the case of money paid to a third person, with the exception of small sums. *Faunce v. Gray*, 21 Pick. 243, 247. But cases of this kind must be decided upon their own peculiar circumstances, depending very much upon the nature of the charges. It is not in every case, where third persons are present at the delivery of goods, that the books of the party cease to be competent evidence. In the ordinary case of a shop-keeper, there would be clerks present at the delivery; but when the items are small and numerous, it would be impracticable to prove them except by the account book and oath of the party. The present case is peculiarly one where a resort to the book is necessary, the account consisting, as it does, of small items, charges of meals for single days, furnished at different times to a large number of persons in the employ of the defendant. The charges singly are small, and not of a character to be proved by a third person, like the cases of money paid to such third person, or articles of property delivered to a third person, to be carried away and kept for his own use. We are of opinion, that the plaintiff's book was properly admitted to prove the charge in the account, and that it was no valid objection, in a case like the present, that the charges were in part, and to a considerable extent, charges for meals furnished to the servants of the defendant. *Mathes v. Robinson*, 8 Met. 269, 271, seems to be in point.

3. As to the further question, arising on the statement in the cross examination, that the defendant "only at the first time requested the plaintiff to furnish the meals," it seems to us, that this answer is to be taken in connection with the previous answer made to another interrogatory put by the defendant, wherein the plaintiff had answered "that Edwards, at the first, requested that the meals should be furnished whenever they were there." The two taken together would embrace future as well as present meals. No objection can be raised to the competency of these answers, as they were in reply to the defendant's interrogatories. *Judgment for the plaintiff.*

THE BERKSHIRE WOOLLEN COMPANY vs. MOODY S. PROCTOR & another.

If the agent of a corporation, engaged in their business, becomes the guest of an innkeeper, and is robbed in the inn, while he is a guest, of money delivered to him by his principals to be expended in their behalf, the innkeeper is liable therefor to the corporation.

If a traveller who puts up at an inn, and is received there as a guest, makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder.

The liability of an innkeeper for a loss by his guest extends to all the movable goods and money, which are placed within the inn, and is not restricted to such things and sums only, as are necessary and designed for the ordinary travelling expenses of the guest.

A usage at an inn, for the guests to leave their money or valuables at the bar, or with the keeper of the house or his clerk, is not binding upon a guest, unless he has actual knowledge or notice of it; and whether he has such knowledge or notice is a question of fact for the jury.

In an action brought against an innkeeper by his guest, for a loss of money stolen from the apartment of the guest, evidence of the custom of other individual innkeepers and their guests, in regard to depositing the money of the latter in safes kept for the purpose, is inadmissible.

In this case, which was argued by *E. Merwin*, for the defendants, and by *I. Sumner*, for the plaintiffs, on exceptions taken by the former to the rulings and instructions of *Byington, J.*, at the trial in the court of common pleas, the facts sufficiently appear in the opinion of the court, which was read at the September term, 1852, as drawn up by

FLETCHER, J. This is an action on the case against the defendants, as innkeepers, for the alleged loss of five hundred dollars of the plaintiffs' money in the inn of the defendants, known as the Marlboro' Hotel, in the city of Boston. It was admitted that the defendants were innkeepers, and proprietors of said Marlboro' Hotel.

It appears from the testimony, that about the 15th of October, 1849, Asa C. Russell, an agent and servant of the plaintiffs, went to Boston with some twenty five witnesses, to take charge of a lawsuit to which the plaintiffs were a party; that he took with him one thousand dollars of the plaintiffs' money, for the purpose of defraying the expenses of their said suit; that he, with some of the plaintiffs' witnesses, put up at the

Marlboro' Hotel; that he kept a part of the money in his trunk, in his room, and took it out as he wanted it for daily use, to pay witnesses; that on the 2d of November, 1849, he counted his money, and found he then had just five hundred dollars, which he rolled up in a newspaper, and put the packet in the bottom of his trunk, under his clothes, and locked the trunk; that on the evening of the 3d of November, he found that the lock had been picked and the money had been taken from the trunk. He immediately gave notice to the defendants, and he with them made diligent search for the money; but it was never found. Some of the plaintiffs' witnesses boarded with the defendants at their said inn, and Russell told the defendants that he would be responsible for the board of said witnesses. He agreed with the defendants for the price of his board by the week, and if he did not stay a week the price was to be greater than at the rate by the week. He testified that he thought he told one of the defendants that he was agent of the plaintiffs, but was not certain; that he did not inform the defendants that he had money with him, till after the loss; that the defendants called his attention to a safe in the office after the loss, but that he did not know whether he saw it before the loss or not. He further testified that he thought it was a custom in Boston for innkeepers to have safes, but not a general custom for guests to deposit in them. He did not know that any body deposited packets in the Marlboro' Hotel. He also testified that it was his usual practice to lock the door of his room when he went out, and to leave the key in the door, but could not speak positively as to the 2d and 3d of November. This witness, and others produced by the plaintiffs, testified to the practice of guests at the defendants' inn, of leaving keys in the doors of their lodging rooms. To this the defendants objected, but it was admitted, with the instruction, that it was not to be considered by the jury, unless shown to be the usage of the house, and that known to the defendants. Russell further testified, that the only regulations of which he saw notice given, were contained in a printed notice posted in the house, which will be hereafter examined. One of the plaintiffs' witnesses testified that one of the defendants stated,

after the loss, that when he suspected that guests had large sums of money, he was in the habit of speaking to them about it, and regretted he had not done so to Russell.

The defendants, in their defence, offered to prove a general and uniform custom with innkeepers in Boston, to provide safes for the purpose of depositing therein large sums of money and other valuable things which their guests may have, and the custom of guests to deposit accordingly. The court ruled that this evidence was inadmissible, and this ruling forms the ground of one of the defendants' exceptions. But the court ruled that it was competent for the defendants to prove fully what was the custom of the defendants' hotel, and of their guests in this particular. Thereupon both parties went at large into evidence as to this alleged custom at the defendants' hotel, and of their guests.

Upon the whole evidence in the case, the defendants contended, and requested the court to instruct the jury, that the plaintiffs were not the guests of the defendants, and that the defendants were not responsible to the plaintiffs for their money in the possession of Russell, though he might be the defendants' guest. But the court declined so to instruct the jury, and instructed them, that if Russell was agent and servant of the plaintiffs, and the guest of the defendants, as before stated, the defendants would be responsible to the plaintiffs for the loss of their said money, without notice, so far as the preceding objections were concerned.

The defendants also contended that, upon the foregoing facts, Russell was not a guest, but a boarder, and that therefore the liability of innkeepers for any losses sustained by Russell as agent and servant, or otherwise, did not attach to the defendants. But the court ruled, that the facts testified to by Russell, if believed, constituted him, in law, a guest, and not a boarder, and that the liabilities of innkeepers attached to the defendants for any loss sustained by him while in their inn as aforesaid.

The defendants further contended, that in any event they were not liable for the loss in this case; that innkeepers are liable in case of loss, at the most, only for a sum of money,

necessary and appropriate, and designed for the ordinary expenses of the guest, including his expenses at the inn; and that in this case the defendants were not liable for this packet of five hundred dollars, inasmuch as the same was not necessary, appropriate, or designed for the ordinary travelling and inn expenses of said Russell, but was for the purpose of defraying the expenses of said lawsuit; and the defendants requested the court so to instruct the jury. But the court instructed the jury that, if the money in this case was kept by said Russell in his room, and was for the purpose of defraying the expenses of the business for which he was there in the lawsuit; and if the defendants had knowledge of his business as agent of the plaintiffs, and of their liabilities to their witnesses; and if the plaintiffs were responsible to the defendants for the board of their witnesses, though they did not in fact pay for the board of all; and the sum was a reasonable one for such business; then the defendants would not be relieved from their liability on account of the amount of the money, or of the purpose for which the agent had the same.

The defendants further contended, that though they might be primarily liable in law, they would be exonerated from all liability for the loss by showing that the loss was occasioned by the negligence of the guest himself, and upon this point requested the court to instruct the jury, that if they believed the custom of depositing in the safe prevailed in the defendants' hotel, as testified to by their witnesses, though no special notice thereof was given to said Russell, he being a guest in said hotel, was bound by said custom, and was in law presumed to know it; and that upon the facts disclosed, the jury were bound to infer that the loss was occasioned by the negligence of said Russell in keeping the packet in his trunk and giving no notice to the defendants that he had the same, and leaving his door with the key in the lock, as stated, and not by the negligence of the defendants. But the court declined so to instruct the jury, and instructed them that, if said Russell, the plaintiffs' agent and servant, had knowledge of said custom of defendants' hotel, the plaintiffs would be bound by it; but if there was such a custom as was testified to by the defend-

ants' witnesses, and said Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it.

The jury were also instructed, that the defendants would not be responsible for the loss, if it was occasioned by the fault or the negligence of said Russell, the plaintiffs' agent, and this matter was submitted to them for their decision, upon all the evidence introduced by the parties bearing upon this question.

A verdict having been found for the plaintiffs, the defendants alleged exceptions to the foregoing rulings and instructions of the court of common pleas.

It is maintained, in behalf of the defendants, that the evidence offered by them, to show a general and uniform custom of the hotels in Boston, and their guests, to have money deposited in safes kept for that purpose; which was excluded at the trial, should have been admitted. This evidence is in depositions on file, which are made a part of the case, to be referred to in order to show what was the evidence offered. This testimony consists of four depositions, each deponent being the keeper of a hotel in Boston. Each witness states the custom of his own particular house and guests; but neither of them is able to state, or undertakes to state, any general and uniform custom upon the subject in question among the various hotels in Boston. The knowledge of these witnesses is confined to their own houses and customs, respectively, and does not extend to other houses, so as to enable them to speak of their own knowledge of any general or uniform custom. Proof of the usage of four houses, out of the whole number of public houses in Boston, would hardly be regarded as establishing any general usage. But the usage of these four houses does not appear to be uniform. Two of the witnesses testified that they had printed regulations posted up in the rooms of their respective houses, among other things, requiring their guests to leave their money and other valuable articles at the office, to be deposited for safety in their safe. The two other witnesses testified that they had printed regulations posted up in their respective houses; but that there was no

regulation or notice in regard to depositing money, or other valuable articles, for safe keeping. In two of the four houses, therefore, of whose custom evidence was particularly given, it was the custom to give particular notice to the guests to deposit their money, and in two of them there was no custom to give such notice. There was, therefore, in the custom of these four houses, a very striking want of uniformity in a matter of vital importance. In regard to the custom of the guests in these houses, it appears, from the evidence, that some of them deposited their money, and this is all which does distinctly appear. The evidence wholly fails to establish the position, that there was any general, uniform custom of the guests, even in these four houses, to deposit their money in the safes. Independently, therefore, of the reason for the exclusion of this evidence, that, in determining the duties and liabilities of these defendants, the custom of other innkeepers and their guests was wholly irrelevant, the evidence was properly excluded, as being wholly incompetent, giving it its whole effect, to be submitted to the jury, to warrant them in finding the existence of any such general and uniform custom among innkeepers and their guests, as was set up by the defendants. Such a verdict, if found upon this evidence, could not be sustained. A usage to be adopted as a rule of law should be certain, and should be general in the branch of trade or business in regard to which it is set up, so as to authorize a presumption, that it is known to those dealing, or concerned in that branch of trade or business. A very eminent judge has said, "I am among those judges who think usages among merchants should be very sparingly adopted, as rules of law, by courts of justice, as they are often founded in mere mistake, and more often in the want of enlarged and comprehensive views of the full bearing of principles." Story, J. in *Donnell v. Columbian Ins. Co.* 2 Sumner, 377. The rights of parties must be determined by law, and not by any vague, and undeterminate and partial usage of particular persons or places. A strict adherence to this principle is essential to a sound and consistent administration of justice. A departure from it would work great injustice. No man could know what were

his rights or his duties, if they were to be determined by loose evidence of some particular, indefinite and partial usage.

It is very improbable, from the nature of the case, that there could be any such general and uniform custom as the defendants attempted to prove. Individuals would, most likely, act according to their individual discretion, under the particular circumstances in which they were respectively placed. It is very difficult to see how it could be known, whether guests having money did, or did not, generally or uniformly, deposit it for safe keeping. The fact, that some deposited their money, might be readily known; but the fact that others, and perhaps the greatest number, having money, did not deposit it, might not be known.

But it is sufficient, that the evidence offered in this case was incompetent to establish, or warrant the jury in finding, the existence of any such general and uniform usage as was set up by the defendants. The defendants were permitted fully to prove what was the custom of their own house and guests. This was the only custom with which they were connected, and of which they could avail themselves. For what purpose the defendants proposed to give evidence of the custom of other houses and their guests, was not stated, and does not appear. Surely the defendants could not take advantage of the custom of other houses, if it differed from their own; and if it was the same as their own, so far as it appears, it would have been wholly immaterial. The defendants having been permitted fully to prove the custom of their own house and guests, it does not appear that their rights were, or could be, in any way affected by the exclusion of the evidence as to the custom of other houses and their guests.

It is further maintained for the defendants, that Russell was not a guest, in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants, as their guest at their inn, the relation of innkeeper and guest, with all the rights and liabilities of that relation, was instantly established between them. The

length of time that a man is at an inn, makes no difference; whether he stays a week or a month, or longer, so that always, though not strictly *transiens*, he retains his character as a traveller. Story on Bailm. § 477. The simple fact that Russell made an agreement as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract, as to the price to be paid for his lodging, and whether it were more or less than the usual price, it would not affect his character as a guest. The character of guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest, in the sense of the law. But Russell was a traveller, and put up at the defendants' inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense, a guest.

Another ground of defence taken in behalf of the defendants is, that this action cannot be maintained, because the plaintiffs, being a corporation, were not, and could not be, in the nature of things, the guest of the defendants; that an innkeeper is liable only for the goods of his guest; and that, therefore, the defendants are not liable for the money of the plaintiffs, as they were not, actually nor constructively, the guests of the defendants. But this reasoning cannot prevail. Russell was the defendants' guest, and he was the agent and servant of the plaintiffs; and the money which was lost, and for which this suit was brought, was the plaintiffs' money, in the possession of Russell, delivered by the plaintiffs to him, as their servant and agent, to be expended in their business. This action, therefore, can well be maintained upon the well settled principle of law, that, if a servant is robbed of his master's money or goods, the master may maintain the action against the innkeeper in whose house the loss was sustained. This point was directly settled in *Bedle v. Morris*, Yelv. 162, and notes and cases cited in the American edition. In that case it was said by the court, "And moreover it is not mate-

rial whether he was his servant or not; for, if it was his friend by whom the party sent the money, and he is robbed in the inn, the true owner shall have the action." *S. C. Cro. Jac.* 224. The doctrine is thus stated in Bacon: "If a man's servant, travelling on his master's business, comes to an inn with his master's horse, which is there stolen, the master may have an action against the host, because the absolute property is in him. So, if A. sends money by his friend, and he is robbed in his inn, A. shall have the action." *Bac. Ab. Inns and Innkeepers*, C. 5. Such was also adjudged to be the law in *Towson v. Havre de Grace Bank*, 6 Har. & Johns. 47, 53. In this case, after stating the position, that if A. sends his money by his friend, who is robbed in the inn at which he is a guest, A. shall have the action, the court say: "And there is no reason why it should not be so, the innkeeper being chargeable, not on the ground that he entertains the owner of the money, or other goods, but because he receives, no matter by whom paid, a compensation for the risk." See also *Bennett v. Mellor*, 5 T. R. 273.

The case of *Mason v. Thompson*, 9 Pick. 280, goes still further. In that case, G. hired the horse, chaise and harness of the plaintiff, and drove the same to Boston, where she stopped, as a visitor, with a friend, and sent the horse, chaise and harness to the stable of the defendant, who was an innkeeper, to be kept during her visit. After four days, she sent for the property, and found that a part of it had been stolen, for which the innkeeper was held liable to the plaintiff, who was the owner. It was urged for the defendant, that neither G. nor the plaintiff was the defendant's guest, as neither of them had diet or lodging at the defendant's inn. But the court said, "it is clearly settled, that to constitute a guest, in legal contemplation, it is not essential that he should be a lodger, or have any refreshment, at the inn. If he leaves his horse there, the innkeeper is chargeable on account of the benefit he is to receive from the keeping of the horse." Upon this point, the case of *Yorke v. Grenough*, 2 Ld. Raym. 866, was relied on. In *Grinnell v. Cook*, 3 Hill, 485, the case of *Mason v. Thompson* was commented on, and that part of it which held, "that,

to constitute a guest in legal contemplation, it is not essential that he should be a lodger, or have any refreshment at the inn," was controverted, as not warranted upon principle, or by adjudged cases. Bronson, J., in giving the opinion of the court, says: "But when, as in *Mason v. Thompson*, the owner has never been at the inn, and never intends to go there as a guest, it seems to me little short of a downright absurdity to say, that, in legal contemplation, he is a guest." But this particular point is not material in the present case, as in this case Russell was the defendants' guest. Though it be settled that the owner of the goods or money may have an action, it may also be, that an action could be maintained either by the servant or master.

Another ground of defence is, that the defendants are not liable for the loss in this case; as innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of guests, and for no more. Such was the doctrine held by this court in the case of *Jordan v. Fall River Railroad*, 5 Cush. 69, in regard to the liability of a carrier of passengers for baggage. Formerly, it was held, that a carrier of passengers was not answerable for baggage at all, unless a distinct price was paid for it; but it is now held, from the usual course of business, that a contract to carry the ordinary baggage of the passenger is included in the principal contract, in relation to the passenger, and the price paid for fare is considered as including a compensation for carrying the baggage; so that a carrier is answerable for the loss of baggage, although there was no particular separate agreement concerning it. But this implied undertaking by a carrier of passengers does not extend beyond ordinary baggage, or such things as a traveller usually carries with him for his personal convenience on the journey, including such an amount of money as, under the circumstances, may be necessary, and is designed, for the payment of travelling expenses. A common carrier of passengers is not responsible, unless by a special contract, for goods and chattels, or money, not properly belonging to the baggage of the passenger. *Jordan v. Fall River Railroad*, 5 Cush. 69. But common carriers of goods are re-

sponsible for any amount of goods and money which may be intrusted to them, when the carriage of money is within the scope of their employment and business.

The responsibility of innkeepers for the safety of the goods and chattels and money of their guests is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money. The law on this subject is very clearly and succinctly stated by Chancellor Kent, as follows: "The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest, which are placed within the inn." 2 Kent Com. 593. The liability of an innkeeper for the loss of the goods of his guest being founded, both by the civil and common law, upon the principle of public utility, and the safety and security of the guest, there can be no distinction, in this respect, between the goods and money. *Kent v. Shuckard*, 2 B. & Ad. 803; *Armistead v. White*, 6 Eng. Law & Eq. R. 349; *Quinton v. Courtney*, 1 Haywood, 40. The principle for which the defendants contend, that innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests. The reasoning, both of the civil and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely, almost entirely, on the good faith of innkeepers; that it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord; and that therefore the public good and the safety of travellers require that innholders should be held responsible for the safe keeping of the goods of the guests. This reasoning maintains the liability of the innkeeper for the money of the guest, quite as strongly as his liability for goods and chattels, and it would be clearly inconsistent with the general principle upon which the liability is founded, to hold that the defendants were not responsible for the money lost in the present case. 2 Kent Com. 592 to 594; Story on Bailm. §§ 478, 481; *Sneider v. Geiss*, 1 Yeates, 35.

The defendants further contended that, although they might be, primarily, liable in law, yet they would be exonerated from all liability, by showing that the loss was occasioned by the negligence of the guest himself, and upon this point requested the court to instruct the jury "that, if they believed that the custom of depositing in the safe prevailed in the defendants' hotel, as testified to by their clerks and servants, although no special notice thereof was given to said Russell, and if, contrary to said custom, said Russell retained this packet in his possession, keeping it in his trunk, gave no notice to the defendants that he had the same, and left his door with the key in the lock, in the manner stated, and took no other precaution, to secure his room, (although the jury should believe that, in this respect, he followed the practice of other guests, who were not proved to have kept money in their rooms,) said Russell, being a guest at said hotel, was bound by said custom, and was, in law, presumed to know it; and that, upon these facts, the jury were bound to infer that the loss was occasioned by the negligence of said Russell, and not of the defendants." But the court declined so to instruct the jury, and instructed them, that if Russell, the agent, had knowledge of said custom of the hotel, the plaintiffs would be bound by it, and if there was such a custom, as testified to by the witnesses for the defendants, and Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it. The jury were also instructed, that the defendants would not be responsible for the loss, if it was occasioned by the fault or negligence of Russell, the plaintiffs' agent; and this matter was submitted to them for decision, upon the evidence introduced by the parties bearing upon the question.

The defendants' counsel objected to the instruction, "that if there was such a custom, as testified to by the witnesses for the defendants, and Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it;" and contended, that Russell was bound in law to know the custom, and was in law presumed to know it, and that the jury should have been so instructed. The evidence

of the custom at the defendants' hotel is contained in the following question and answer, in the deposition of the defendants' clerk: "*Interrogatory*. Is there not a custom amongst those stopping at hotels, to leave money or valuables at the bar, or with the keeper of the house, or his clerks? State particularly as to this custom, if it exists, and how general it is.

Answer. It exists at the Marlboro' Hotel, I know, and to some extent in other hotels." Nothing particular or specific, in regard to the custom, is stated; nor whether it was the custom of all, or of what proportion of the defendants' guests, having money, to deposit it for safe keeping. In the printed regulations, posted up at the defendants' inn, and which purported to give notice to the guests of the regulations and usages of the house, there was not the slightest notice or intimation to the guests to leave their money at the bar, or with the keepers of the house, or their clerks, or that such was the custom of the house; nor did it appear that any such notice was given in any way to Russell. There surely can be no legal inference or presumption of law, that Russell had knowledge of this particular usage of the defendants' house. Upon this point, the case of *Stevens v. Russell*, 9 Pick. 198, is conclusive. In that case, it appeared that it was the usage in a woollen factory in Andover, and some other neighboring factories, that no person employed should leave their service without giving a fortnight's notice of his intention to quit. A weaver, who did not know of this usage, worked in the factory, and left without giving any previous notice. It was held, that as this was a particular, private usage, to make it binding on the party, it must appear, as a matter of fact, that he knew of the usage when he entered on the work, or before he left it. Proof of knowledge, as a matter of fact, is required in order to give effect to any and all particular usages, not of so general a nature as to furnish a presumption of knowledge. There certainly can be no legal presumption that every traveller who alights at an inn, has knowledge of the particular usages of that particular inn, of which there is no notice in any way given to him. Whether Russell had and knowledge of the alleged custom of the defendants' inn for

Woodworth v. Ranzehausen & Trustees.

the guests to deposit their money, was properly submitted to the jury as a question of fact, to be decided by them upon the evidence in the case ; and the instructions of the court, as to the effect of such knowledge on the rights of the plaintiffs, were certainly sufficiently favorable to the defendants.

All the exceptions are overruled, and judgment must be rendered on the verdict for the plaintiffs.

WILLIAM S. WOODWORTH vs. WILLIAM RANZEHOUSEN &
Trustees.

An officer's return on a trustee process, that he has served the same on a certain agent of the alleged trustees, is conclusive evidence that the service was made on such agent.

In this case, the officer's return stated that, on the 3d of February, 1851, he summoned the Western Railroad Corporation, who were named in the writ as trustees of the principal defendant, "by giving Seth W. Norton, agent for said corporation at Pittsfield, in hand, a true copy of the writ," &c.

The said alleged trustees moved the court that they might be discharged, on the grounds, that the summons was served only on one Green, a ticket clerk of the corporation at Pittsfield, and not on "any officer having charge of their business," within the meaning of the Rev. Sts. c. 90, § 43 ; that said Norton was the only agent of the corporation at Pittsfield having charge of their business ; and that notice of this service did not reach any of their officers at Springfield, where their principal office, from which all payments to their servants were made, was located, until after they had paid to the principal defendant, who was a workman in their employ, the full amount of his goods, effects, and credits in their hands at the time of the service on Green ; which payment they made on the 8th of February, 1851.

J. D. Coll, for the trustees, cited Rev. Sts. c. 109, § 5 ; *Williams v. Marston*, 3 Pick. 66 ; *Robinson v. Hall*, 3 Met. 301 ;

Johnson v. Stevens.

Rev. Sts. c. 90, § 43; *Sibley v. Smith*, 19 Pick. 547; *Smith v. Stearns*, 19 Pick. 20; *Crossman v. Crossman*, 21 Pick. 25; *Hawes v. Langton*, 8 Pick. 71; *Barker v. Taber*, 4 Mass. 81.

H. W. Taft, for the plaintiff.

FLETCHER, J. The trustees, by their answer, admit, that at the time of the service of the writ, they owed the principal defendant a certain sum; but they insist, that they are not chargeable as trustees, for the reason that the writ was served only on a ticket clerk of the corporation, and not on one Norton, the agent of the company, on whom, they maintain, it should have been served; and they allege, that by reason of such defective service, or some other reason, they made payment of the sum due from them to the principal defendant, before they had any notice of the suit.

But the officer returns that the writ was served personally on Norton, who was the proper agent of the trustees, as they themselves allege, on whom to make service. That the return of the officer must be conclusive as to the fact of service, is too familiar and well settled a principle of law, to be now questioned. The service, therefore, appears to have been made personally on the proper officer of the trustees, on the 3d of February, and the payment was made by the trustees to the principal defendant on the 8th of February, five days after the service, and when there had been ample time for information to have reached the proper officer of the corporation, so as to have prevented the payment. The payment by the trustees was, therefore, made in their own wrong, and cannot avail them. This case is not within the provisions of the statute as to payments without notice, and is not like the cases referred to in the argument for the trustees.

Trustees charged.

BENJAMIN F. JOHNSON vs. MOSELEY W. STEVENS.

A release to a tenant in common from his co-tenants, of their interest in a specific part of the land held in common, confirms a conveyance previously made by him of that part of the land.

The first mortgagee of land may sell on execution, to satisfy the mortgage debt, the mortgagor's right to redeem a second mortgage of the same land.

THIS was a writ of entry; and the case was submitted to the court, upon the following statement of facts:

The demanded premises were originally a part of a tract of land, in Pittsfield, owned in common by the tenant and other heirs of one Abner Stevens, deceased. Said heirs, on the 23d of March, 1846, entered into a written agreement that the tenant should erect a house and shop on the demanded premises, and that when partition was made, the demanded premises should be assigned to the tenant, as his share of the land so held in common. The tenant accordingly erected his house and shop upon the demanded premises, before any partition was made, or conveyance by the other heirs to the tenant, of the demanded premises. The tenant, on the 26th of May, 1847, conveyed the east part of the demanded premises, upon which the shop stands, by metes and bounds, to one Fairfield, in mortgage, conditioned to secure the payment of a note for \$400, signed by the tenant as principal, and one Root as surety. On the 27th of June, 1849, the other heirs of Abner Stevens, released all their title in the demanded premises to the tenant; and on the 10th of July, 1849, he mortgaged the whole of the demanded premises, both house and shop, to one Merrill. On the 23d of November, 1850, Fairfield recovered judgment on his note against the tenant and Root, and execution was duly issued thereon, and on the 8th of April, 1850, levied upon the equity of redemption which the tenant had in the demanded premises; and the same was afterwards sold and conveyed by the sheriff to the plaintiff, by a deed dated the 21st of January, 1851, which describes the premises conveyed in the mortgage to Merrill, and was duly acknowledged and recorded. At the time of the sale, the sheriff stated the amount of the incumbrances to be the amount of the Merrill mortgage, he supposing that to be the only incumbrance on the estate.

The tenant contends, upon the foregoing facts, that the sale of the equity was illegal, and that nothing passed by the sheriff's deed to the plaintiff. The demandant contends that the sale was valid and effectual to transfer to him the right of re-

deeming the whole of the demanded premises, or, at least, that portion of the demanded premises not embraced in the mortgage to Fairfield. If the court are of opinion, that the demandant is entitled to recover a part or the whole of the demanded premises, judgment is to be rendered for him accordingly; otherwise, the demandant is to become nonsuit.

J. D. Colt, for the demandant.

E. Merwin, for the tenant.

The opinion was delivered at September term, 1852.

METCALF, J. Although the tenant, when he made the mortgage to Fairfield, by metes and bounds, did not thereby affect the title of his co-tenants, yet their subsequent release to him operated as a confirmation of Fairfield's title to so much of the premises now demanded as was included in that mortgage, and also enabled the tenant to make a valid mortgage of the whole of these premises, by metes and bounds, to Merrill. Both mortgages are, therefore, to be regarded as having been valid against all persons. And the only question now is, whether Fairfield, having recovered judgment on the note, which was secured by his mortgage, could legally sell, on execution, the tenant's right of redemption in the demanded premises. In other words, the question may be simply stated thus: Can the first mortgagee of land sell, to satisfy the mortgage debt, the mortgagor's right to redeem a second mortgage of the same land? We are of opinion that he may.

The defence of the tenant is rested on the cases of *Atkins v. Sawyer*, 1 Pick. 351, and *Washburn v. Goodwin*, 17 Pick. 137, in which it was decided that neither a mortgagee nor his assignee can sell the equity of redemption in the property mortgaged, for the purpose of satisfying the mortgage debt. The courts of other states have made similar decisions. *Camp v. Coxe*, 1 Dev. & Bat. 52; *Goring's Executrix v. Shreve*, 7 Dana, 64; *Waller v. Tate*, 4 B. Monr. 529. See also *Tice v. Annin*, 2 Johns. Ch. 125.

One ground of the decision in *Atkins v. Sawyer* was, that if the sale were held valid, its operation would be repugnant to the statute regulating the foreclosure of mortgages; as it would enable the mortgagee, at his pleasure, to reduce the

mortgagor's right of redemption from three years to one. In the language of Parker, C. J., 4 Pick. 135, the court were of opinion that a mortgagee "holds the land, by contract, in such a manner as to give the mortgagor certain legal rights as to the time and manner of defeating his estate, and therefore he ought not to be allowed to resort to process against the same land, which will necessarily abridge those rights." But it was decided, in *Crane v. March*, 4 Pick. 131, that the holder of a negotiable note, secured by mortgage, and indorsed by the mortgagee, without an assignment of the mortgage, might lawfully sell the mortgagor's equity of redeeming the mortgaged land, to satisfy a judgment recovered on the note. It was said by the court, in that case, that the mortgagor might be subject to some of the inconveniences suggested in *Atkins v. Sawyer*, but that they were of his own creation, as they arose out of the form of the contract, which he chose to make, by giving a negotiable note, instead of a bond which could be sued only in the name of the mortgagee. In the present case, the mortgagor, (the tenant,) by his own act, created a new equity of redemption, partly in the land previously mortgaged to Fairfield, and partly in other land. No part of this new equity was the subject of any contract between Fairfield and the tenant. The contract between Fairfield and the tenant, which the former is not permitted to violate, extends only to the right of the latter to redeem the first mortgage. And Fairfield might sell that right, for the purpose of satisfying any other debt, besides the one secured by that mortgage, and might also satisfy the mortgage debt by a sale of any property of the tenant, except that same equity of redemption which he contracted not to sell for that purpose. The right of redeeming the first mortgage, and the right of redeeming the second, are distinct rights, and not the same. See *Reed v. Bigelow*, 5 Pick. 281, 284.

In *Atkins v. Sawyer*, the mortgagor's relation to the mortgaged premises remained the same, at the time of the sale of the equity, as it was at the time when the mortgage was made. He had done no act which changed, or in any way affected, his estate or his right of redeeming it, or the contract between him and the mortgagee.

Mitchell v. Stetson.

The legal consequence of deciding that this demandant cannot recover, would be, that a mortgagor, by giving a second mortgage of the same land, to a different person, and including in it other land also, might place a part of his property, which the first mortgagee might otherwise resort to for satisfaction of the mortgage debt, out of the reach of such mortgage. For when a mortgage is made of different tracts of land, we know of no law by which the equity of redeeming one of the tracts only can be sold.

Judgment for the demandant.

CHESTER MITCHELL, JR. vs. WILLIAM L. STETSON.

Where a son, at the suggestion and by the agency of his father, who was insolvent, purchased and gave his notes for a lot of land with timber growing thereon; and, by an agreement between the father and son, the father was to cut off and sell the timber, and to pay for the labor and other charges, out of the proceeds, and appropriate the balance towards payment of the notes given for the purchase money, and to pay any remaining surplus to the son; it was held, that trees cut and lumber sawed under this agreement were the property of the son, who might maintain trespass against an officer for attaching the same as the property of the father, and recover damages to the full value of the property at the time of the trespass.

THIS was an action of trespass to recover the value of one hundred and thirty logs, one thousand feet of spruce boards, one plough, one stove, one grindstone, one crank and one wheelbarrow, alleged to be the property of the plaintiff.

The defendant, in his specification of defence, admitted the taking of the articles, but justified the same, on the ground, that he, as deputy sheriff, took them as the property of Chester Mitchell, senior, on a writ of attachment against him, and afterwards sold them on execution, and appropriated the proceeds in part satisfaction thereof.

At the trial in the court of common pleas, before *Byington*, J., the plaintiff admitted these facts, but contended, that the articles taken were not the property of Chester Mitchell,

Mitchell v. Stetson.

senior, and could not be taken for his debt; and he called Chester Mitchell, senior, as a witness, who testified that the property in question belonged to the plaintiff; that he was himself poor, had taken the benefit of the insolvent law, and had been in poor health; that he knew of the lot, from which the lumber was taken, being for sale, and made an offer for the same, telling the owner that he had not the means of paying, but would find a purchaser; that the plaintiff agreed to buy it, if the witness could get it for the price offered; that the witness negotiated a sale to the plaintiff, who bought it, took a deed of it, and gave his notes in payment; that the plaintiff told the witness to go on and get off all he could from the lot, to pay for it from the proceeds, besides paying for the labor, and to pay the surplus, if any thing, to the plaintiff, and to do what he could towards getting a living; that the plaintiff furnished some provisions for the men who worked getting off the timber; that the witness went upon the lot and peeled some bark and got off logs; that the logs attached were at the saw mill at the time, and were the first lot of logs got off from the lot; that he drew the logs to mill and worked as much as his health would allow, which was not much; that he sold some bark and lumber, and took notes payable to himself and collected them; that the sum of sixty two dollars, which he received on a note for bark thus sold, he paid on a note given and due from the plaintiff; that the sales of bark and lumber were in his own name; that he had leave to exchange the boards and lumber for things which he wanted for his house; and that his own understanding was, that things so obtained were to be his son's property. The plough sued for, he bought with boards which came from the lot, and he afterwards told his son of it, who said it was all right. He bought the stove also with boards from the lot, and afterwards informed his son of it. The stove was placed in his parlor. The grindstone, crank and wheelbarrow, he bid off at auction, but he had not paid for them and did not know that his son had. It was also proved, that the sawing of the lumber was charged to the father; and that the father sold timber that came from this lot to one Bartlett, who paid for it in work, in getting timber off the lot.

The defendant contended that this evidence showed, that there was such an intermingling of the property of the plaintiff and his father, as rendered it impossible for the defendant, when making the attachment, to separate and distinguish the property of the father from that of the son, and that this intermingling was by the permission of the plaintiff; and he contended, that this action could not be maintained until the plaintiff had first pointed out his property and made demand of it. But the judge ruled otherwise, and instructed the jury that the evidence did not show title in the plaintiff to the grindstone, crank and wheelbarrow, and that he was not entitled to recover for them; that in regard to the other property, although the timber belonged to the plaintiff, before it was cut, while standing in his lot, yet if he authorized his father to get off the timber, and appropriate it to his own use, and he did so, then the plaintiff could not recover, and that this was a question of fact for the jury to decide; and, if he sold timber, and with it bought things, and appropriated them to his own use by permission of the plaintiff, he could not recover for things, so bought and appropriated; that the question for them to decide was, in whom was the property, at the time it was taken by the defendant. Having been the property of the plaintiff when standing on the lot, had it, or any part of it become the property of the father? if it had, the plaintiff could not recover for such as had so become his father's property; that if all the property belonged to the plaintiff, he would be entitled to recover its value, though its value had been increased by the labor of the father.

The defendant then asked the judge to instruct the jury, that if the father and son were tenants in common of the property, the latter could only recover his interest in it. The judge remarked that he was not aware that the evidence showed a tenancy in common; but did then instruct the jury, that if they should so find, they would give him damages only to the amount of his interest in the property.

The jury returned a verdict for the plaintiff; and the defendant excepted to the foregoing rulings and instructions.

W. Porter, for the defendant.

Mitchell v. Stetson.

E. Merwin, for the plaintiff.

BIGELOW, J. We can see nothing in the facts of this case to warrant the assumption, that any part of the property, for the taking of which damages were given by the jury, vested in Chester Mitchell, senior. The plaintiff was the owner of the land from which the lumber was taken, having purchased and paid for it by his own promissory notes. By an agreement between him and his father, the latter was to cut off and sell the timber standing on the land, and out of the proceeds to pay for the labor and other charges attendant thereon, and to appropriate the balance towards payment of the notes given for the purchase money. If any surplus was left, it was to be paid over to the plaintiff. This is the common case of principal and agent. No property was vested in the father by the arrangement between him and his son. The former was to be paid out of the property of the principal for his own labor and the charges of executing the agency, but he acquired no title to the property, which was intrusted to his care. The right to deduct from the proceeds of the property, when sold, a sum sufficient to pay for the labor and expense laid out in preparing it for market, was only one mode of paying a debt, for which the plaintiff was liable as principal; but it did not change the legal relation of the parties, or vest any title to the lumber in the agent, as against third persons. The cases are numerous in the books, in which it has been held, that materials, delivered to a person for the purpose of being manufactured, still continue the property of the original owner, although their nature and character may be essentially changed by the process, and their value largely increased. In such cases, there is no contract of sale, and no act done which divests the property of the original owner. It is merely a contract, between a principal and an agent, or employer and employee, the former having the title to the property, and the latter a claim for compensation for his labor. The mode in which this compensation is paid, whether by a right to sell on the part of the agent and to deduct it from the proceeds, or by a direct payment of it by the principal, is quite immaterial. In either case, the title to the pro-

perty remains unchanged, and still continues in the original owner; were it otherwise, it would be difficult to carry on the common transactions of business without an endless confusion in the rights of property. *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. 177.

It follows, as a necessary consequence of these principles, that the entire right of property was in the plaintiff, and, as against the defendant, a right to its immediate possession. He can therefore recover in this action its full value at the time of the trespass. The labor and expense bestowed upon the property, although they may have added to its value, are merely the incidents which follow the right of property. They cannot be separated from it, and necessarily therefore accrue to the owner. The general rule of law is, that the owner of property, whether it be movable or immovable, has the right to that which is united to it by accession or adjunction; a trespasser can acquire no right in property on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone. *Mo.* 20, pl. 67; 2 *Kent Com.* 362; *Betts v. Lee*, 5 *Johns.* 348; *Petirce v. Goddard*, 22 *Pick.* 561. Besides; the labor and expense bestowed on the property would constitute a valid claim against the plaintiff, if from any cause payment should not be realized out of the proceeds of the sale. The fallacy of the argument on the part of the defendant consists in regarding the services of the father in cutting and drawing the lumber as creating in him a right of property to the lumber itself. But there was no agreement to that effect between the parties, and the law implies no such contract from the facts reported in the bill of exceptions.

Perhaps the most conclusive test as to the right of the plaintiff to recover the full value of the property at the time of the trespass may be found in the consideration, that, upon the evidence in this case, it is clear that he could have maintained replevin for the property taken by the defendant. He would then have received and held the specific articles in the state in which they were when attached by the defendant, with all the additions and increase of value, which had accrued by

Church & others v. Savage.

the labor of the father. See *Martin v. Porter*, 5 Mees. & Welsb. 352. The father having no property in the boards or lumber taken by the defendant, it follows that there was no such intermingling of property as would justify the officer in attaching the goods of the plaintiff. The few articles which really belonged to the father, being of a wholly different kind from those which were the property of the plaintiff, and, so far as the case shows, entirely separated therefrom, there is no ground for sustaining the exceptions on this point.

We are wholly unable to perceive any reason for supposing that the jury were misled by the other instructions of the court, to which exception is taken. The first was a mere statement of a familiar principle of law, which could not have been misunderstood or misapplied by the jury; and the second was a remark which the learned judge was fully warranted in making by the facts proved in the case. *Exceptions overruled.*

JONATHAN CHURCH & others vs. HAMBLIN SAVAGE.

An administrator, who, after representing the estate of his intestate insolvent, sells real estate, pursuant to license from the probate court, may apply the proceeds of such sale to the payment in full of a debt secured by mortgage on said real estate, duly recorded, but previously unknown to him and the purchaser, and charge himself in his account with the balance only of such proceeds.

This was an appeal from a decree of the judge of probate for this county, allowing the account of the respondent as administrator of the estate of Mason Gordon.

The respondent in his account charged himself with the "avails of the sale of real estate sold by order of probate court, (subject to incumbrances,) \$12," and in a memorandum at the foot of the account stated that said real estate was sold for the sum of \$516, but that at the time of the sale there was a mortgage thereon, amounting with the unpaid interest to \$504, which amount was liquidated by the administrator; and that this mortgage was entirely unknown to himself or to the purchaser at the time of the sale. The mortgage had

been duly recorded. At the time of the sale Gordon's estate had been represented insolvent, and commissioners of insolvency had been appointed to receive and examine claims against it.

The appellants filed as reasons of appeal: 1. That the respondent did not charge himself in his account with the sum of \$516, received by him for the sale of the real estate of his intestate, instead of \$12, as charged in said account; 2. That the respondent, after commissioners of insolvency had been appointed, liquidated and paid in full a debt of \$504, which had not been presented to the commissioners; and had, in effect, charged the same in his account; 3. That the real estate was sold for \$516, subject to incumbrances, as appeared by the account, and that therefore the mortgage in question was an incumbrance to be paid by the purchaser, and not by the administrator; and, 4. That the mortgage was duly recorded, and therefore all persons had legal notice thereof at and before the sale.

I. Sumner and B. Palmer, for the appellants, cited *Rev. Sts. c. 65, §§ 8, 9; c. 68, § 20; Amory v. Francis*, 16 Mass. 308; *Gibson v. Crehore*, 5 Pick. 146; *Abby v. Fuller*, 8 Met. 36.

C. N. Emerson, for the respondent, cited *Hancock v. Minot*, 8 Pick. 29; *Rev. Sts. c. 107, § 30; Stearns v. Stearns*, 1 Pick. 157; *Abby v. Fuller*, 8 Met. 36; *Bascom v. Butterfield*, 1 Met. 586; *Bliss v. Lee*, 17 Pick. 83; *Gordon v. Gibbs*, 3 Smedes & Marsh. 473; *Byrd v. Holloway*, 6 Smedes & Marsh. 199.

SHAW, C. J. The only question here, it appears to us, is a question of fact. If the administrator sold the equity, in terms, that is, the estate subject to the mortgage, then he had no right to pay the mortgage debt. But if he sold an estate, before he could give a title, he must discharge the incumbrance, and the difference was all which could go into the assets of the estate. Whether in form he credited the estate with the gross sale, and charged the payment of the sum necessary to redeem it, or whether he credited the balance only, was a mere difference in the form of keeping the account.

It is stated as among the reasons of appeal, that the administrator paid the mortgagee his whole debt, in full, whereas he

Shaw v. Inhabitants of Becket.

should have paid him a dividend only. But the mortgagee had no occasion to prove his debt, unless he claimed a balance beyond the value of his mortgage. He could not be divested of his security in the mortgage, until his debt was paid in full; and the administrator paid him his debt, not because he was a creditor, but to redeem the mortgaged property and save something for the estate. It was paid out of the avails of the sale, and not of the assets of the estate. Had the administrator paid the mortgagee any thing beyond the clear proceeds of the sale of the estate, it would have been a payment in his own wrong, and could not be allowed him in account.

Nor is it material, that this mortgage was not known to the parties at the time of the sale, although it might have been discovered by searching the record. The mortgage existed, and the administrator, in order to receive his money of the purchaser, must make a good title; and must discharge the incumbrances, whatever they were; and to do this he must pay the debt for which it was mortgaged. If the incumbrances exceeded the value, there was nothing for the administrator to receive.

Decree of the judge of probate affirmed, and the case remitted to the probate court.

SAMUEL G. SHAW *vs.* THE INHABITANTS OF BECKET.

A party, of whom a tax, illegally assessed, has been collected by distress, can recover of the town, in an action for money had and received, only the amount of the tax, with interest thereon from the time of the sale, and not the surplus value of the property sold, nor the costs of distress.

THIS was an action of assumpsit on the common money counts, to recover the price of a horse taken by the collector of the town of Becket, and sold by him as a distress, for payment of a tax illegally assessed upon the plaintiff, for the year 1848, during which year the plaintiff was not an inhabitant of said town. At the trial in the court of common

pleas, before *Byington, J.*, it appeared in evidence, that after the proper preliminary steps had been taken, the collector seized and sold the plaintiff's horse, on his warrant, for the sum of \$62; of which the sum of \$18.14, being the amount of the tax assessed, was paid into the treasury, and the residue, after deducting the expenses of the sale and levy, which were \$4.63, remained in the hands of the collector for the use of the plaintiff.

The plaintiff requested the judge to instruct the jury, that he was entitled to recover the whole amount for which the property distrained was sold, with interest thereon from the time of sale. But the judge refused so to instruct, and did instruct the jury, that the plaintiff was only entitled to recover the amount of the tax and interest thereon from the time of the sale, but not the surplus in the collector's hands, nor the expenses attending the distress. The jury thereupon returned a verdict for the plaintiff, in conformity with these instructions, and the plaintiff alleged exceptions.

J. Rockwell, for the plaintiff, cited *Cummings v. Noyes*, 10 Mass. 433; *Jones v. Hoar*, 5 Pick. 285; *Gilmore v. Wilbur*, 12 Pick. 120; *Watson v. Princeton*, 4 Met. 599, 602; *Randall v. Rich*, 11 Mass. 494; *Sumner v. First Parish in Dorchester*, 4 Pick. 361; *Torrey v. Millbury*, 21 Pick. 64; *Amesbury Manufacturing Co. v. Amesbury*, 17 Mass. 461; *Preston v. Boston*, 12 Pick. 7; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181; *Dow v. First Parish in Sudbury*, 5 Met. 73.

M. Wilcox, for the defendants.

Dewey, J. The plaintiff having, as is conceded, been illegally taxed by the assessors of Becket, and the tax having been collected, an action for money had and received will lie against the defendants to recover back the same. But the further inquiry, and indeed the only matter in controversy, in the case before us, is as to the measure of damages, in a case like the present, where the tax has been collected by a warrant of distress and a sale of the property of the plaintiff at public auction.

If the defendants were charged in trespass or trover for the wrongful conversion of the personal property of the plaintiff,

the damages would be properly given to an extent commensurate with the value of the property illegally taken. But if the party waives the tort, and sues in assumpsit for money had and received, the claim for damages is necessarily limited to the money actually received by the defendant, as avails of the property wrongfully taken. 2 Greenl. Ev. § 117, and cases there cited.

This is the general rule. Does it vary it, that from the peculiarity of the case no remedy in trover or trespass lies as against any body? not against the collector, because his warrant is sufficient authority for him; nor against the assessors, because by statute they are exonerated from all liability, except for the want of integrity and fidelity on their part. It may be, that adequate security to individual rights may render expedient some further legislation to meet cases of this kind; but however that may be, under the present form of action nothing can be recovered of the town beyond the amount of the tax that has been collected, and which alone has gone into the town treasury. This will exclude all payments for costs and charges, occasioned by the levy of the warrant of distress, paid to the collector.

Perhaps this rule will be found not to be so unreasonable, in its operation, as may at first be imagined. The levy and sale can only take place after notice of the tax and demand of the payment of the same. The party has always the opportunity, before any expense is incurred, to avoid the same wholly, by payment of the tax. A payment, thus made to a collector clothed with authority to enforce by levy on the person or property, is not a voluntary payment that cannot be recovered back, but at once lays the foundation for an action against the town, a party always solvent and against whom an execution can be always easily satisfied. It is only, therefore, for a party denying the validity of a tax to pay the same, if demanded by the collector, and payment thereof insisted upon; and having done so, to institute his suit against the town to recover back the same. Having no power to prevent the levy of the warrant of distress, or arrest the proceedings for selling his property, there seems no very strong necessity for permit-

 Locke & another v. Bennett.

ting the additional expense to be incurred, where it may be thus avoided without waiving any rights. It is to be borne in mind, that no such demand can be made for a tax, or necessity exist for paying an illegal one, except where such tax has been assessed by sworn officers of the law, and under all the forms of law.

Without however entering further into the consideration of the policy of the rule of law, as now held, it is sufficient to say, that under our decisions the right of the party to recover in assumpsit for money had and received for a tax illegally assessed, is limited to the amount of the tax, and interest from time of payment, when the tax is paid under protest, or from the time of sale, when there is a levy and sale of property. The question was directly before us in *Dow v. First Parish in Sudbury*, 5 Met. 73, where it was so held.

Exceptions overruled.

JOHN D. LOCKE & another vs. ALANSON BENNETT.

An auditor, appointed under the provisions of the Rev. Sts. c. 96, to hear the parties, examine their vouchers and evidence, state the accounts between them, and make report thereof to the court, is authorized to consider and determine whether a particular individual was the authorized agent of one of the parties, to purchase, on his behalf, the goods charged by the other in account against him.

THE facts of this case, which was argued by *J. E. Field*, for the defendant, and by *I. Sumner*, for the plaintiffs, are stated in the opinion of the court, which was read at September term, 1852, as drawn up by

FLETCHER, J. It does not appear from the bill of exceptions in this case, what was the nature of the action; but it must be taken for granted that it was properly referred to an auditor.

The case having been referred to an auditor, when it came on for trial in the court below the plaintiffs offered the report of the auditor in evidence. The defendant objected to its admission, because the auditor passed upon the question, whether one Ray, by whom the articles charged by the plaintiff in ac-

count, against the defendant, were procured of the plaintiff, was the authorized agent of the defendant, to make the purchase of the goods charged; and moved that that part of the report be stricken out, because the auditor had no authority to pass upon the question. The court overruled the objection, and ruled that the auditor had authority to pass upon that question, as incidental to the matter referred; and instructed the jury, that the report was *prima facie* evidence of the right of the plaintiffs to recover the amount reported by the auditor, he having found that Ray was the authorized agent of the defendant to purchase the goods charged. The jury having found a verdict for the plaintiffs, for the full amount reported by the auditor, the defendant excepts to the foregoing ruling and instructions of the court.

The single question now presented is, whether or not it was within the scope of the authority of the auditor, for the purpose of stating the account between the parties, to consider and decide the question, whether or not Ray was the authorized agent of the defendant, to purchase, on his account, the goods charged by the plaintiff, in account against the defendant. This is a very simple question in form, but one of great practical importance, vitally affecting the power, and consequently the usefulness of auditors. There are several cases in our reports, in which questions touching particular proceedings of auditors, have been raised and settled; but there is no case in which the general nature of their duties has been particularly considered, or in which their general powers have been examined and defined. It is desirable to ascertain the true principle upon which the question raised in the present case should be decided; and to do so, it is necessary to look somewhat into the nature of the duties, and the extent of the powers, of an auditor.

The office of auditor is one of great antiquity in the common law. The old action of account was in use as early as the time of Henry III., and the auditor is an essential part of the machinery in that proceeding. In that action, if the plaintiff succeeds, there are two judgments. The first is, that the defendant do account, *quod computet*, and auditors are there-

upon assigned by the court to take the account. The proceedings before the auditor are by formal pleadings, the plaintiff counting, or charging, what he claims to be due to him, and the defendant putting in a plea or discharge before the auditor, from the various items charged against him. If the pleas in discharge be traversed or denied, or their legal validity be demurred to by the plaintiff, so that the parties are at issue in law or fact, the auditor must certify the record to the court, who will either award a *venire facias* to try the issue, or give judgment on the demurrer. The necessity of sending these issues of fact and law, found before the auditor, to the court, to be there tried, before the auditor can proceed to examine the vouchers of the items of account, occasions difficulties and delays, and has, to say the least, been among the evils which have brought this action of account into disfavor and disuse. Lord Hardwicke observed, on this subject, that the opportunity which the defendant has of delaying the proceedings, by raising a succession of issues, triable in a formal way, like so many separate actions, has brought the action of account into disuse. *Ex parte Bax*, 2 Ves. Sen. 388. But still in *Godfrey v. Saunders*, 3 Wils. 94, the machinery of the action of account, though somewhat rusty by disuse, was operated so successfully, as to work out an account in two years, which the parties had been litigating in chancery, for the same purpose, but without success, for fourteen years. In a more recent case, this action was resorted to with success, in a case involving complicated transactions. *Baxter v. Hozier*, 7 Scott, 233, and 5 Bing. N. R. 288.

But, beside the evils resulting from the restricted power of the auditor, and other defects in this mode of proceeding, the action of account, itself, applies only to particular classes of accounts; so that there were some cases in which mutual accounts could scarcely be adjusted, excepting through the medium of the court of chancery. Equitable relief was originally afforded in the court of chancery, in cases of account, on the ground that the remedy, in ordinary courts of law, was unsatisfactory and inadequate; and hence it came to be laid down as a rule, that such equitable relief should be granted in

nearly all cases. The modern doctrine, as laid down by Chief Baron Alexander, is, that to induce the court of chancery to interfere in ordinary cases of account, the account must be such as could not possibly be taken, justly and fairly, in a court of law. *Frietas v. Dos Santos*, 1 Y. & Jerv. 576.

The course of proceeding in cases of account, in chancery, has always been, when a case comes to a hearing, at once, to refer the matter to one or more of the masters, to take the accounts. The system of referring matters of account to the master, can be traced back to the time of Lord Bacon, whose order on the subject is as follows: "But generally matters of account, excepting in very weighty causes, are not fit for the court, but are to be prepared by reference, with this provision, nevertheless, that the causes come first to hearing, and upon the entrance into a hearing, they may receive some direction, and be turned over to be considered and prepared." Tothill, 49. The whole business of taking and stating accounts, is done by the master. All questions of law and fact, which properly arise in the course of the proceeding, are heard and decided by him. He does not, like the auditor in the action of account, send issues to the court to be tried, but he, himself, decides all the questions as they arise, and keeps the whole business under his own control, till he reports the final result. Such is the general course of proceeding, without stopping to consider separate and special reports, or particular and special orders and instructions of the court; all the proceedings of the master being, of course, subject to the general superintending power and control of the court. The final report of the master, made in pursuance of the order of reference, may be considered as somewhat analogous to the award of an arbitrator at law, subject however to exceptions, and requiring the formal confirmation of the court. Notwithstanding the antiquity and importance of the office of master in chancery, it is understood that it has recently been wholly abolished in England, by act of parliament. The duties which have heretofore been performed by masters, are to be performed by the master of the rolls and the vice-chancellor, each to be assisted by two clerks, especially appointed for that purpose. This reference

to the judicial modes of taking accounts in England, has been made, in the hope that it might afford some aid in ascertaining the appropriate powers and duties of auditors, in taking and stating accounts under our laws.

It is believed that the action of account was never much in use in this commonwealth; and it was practically superseded by the statute of 1817, *c.* 142, which authorized the court to appoint auditors in common actions; and was wholly, and in terms, abolished by the revised statutes, *c.* 118, § 43. In the same section in which the action of account is abolished, it is provided that "when the nature of an account is such, that it cannot be conveniently and properly adjusted and settled in an action of assumpsit, it may be done upon a bill in equity, to be brought in the supreme judicial court, and the said court shall hear and determine the cause, according to the course of proceedings in chancery." The course of proceedings in chancery, under this provision, would be, as we have seen, at once to refer the matter to a master in chancery, to take and state the account; before whom the whole matter would be heard and tried, and who would report the final result; and nothing would come before the court but the exceptions to the master's report.

Besides this provision for adjusting accounts by a bill in equity, provision is made in the revised statutes for the appointment of auditors in suits at law, under which provision the question in the present case arises. The appointment of auditors therefore rests upon the authority of the statute, and their powers and duties are prescribed by statute. The provisions of the revised statutes are much more full and explicit, and indicate the powers and duties of the auditors more clearly and definitely, than those of the statute of 1817. By the revised statutes, *c.* 96, it is provided as follows:

"SECT. 25. Whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts, or an examination of vouchers by the jury, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and to state the accounts, and make report thereof to the court."

"SECT. 27. When there is more than one auditor, they shall all meet and hear the cause, but a report by a majority of them shall be valid.

"SECT. 28. Witnesses may be summoned, and compelled to attend and testify before the auditors, in the same manner as before arbitrators or referees."

"SECT. 30. The report of the auditors, if there is no legal objection to it, may be used by either party as evidence on the trial before the jury; but it may be impeached and disproved by other evidence, produced on the trial by either party."

In the case of *Whitwell v. Willard*, 1 Met. 216, the question was, whether that was a case, within the statute, in which the court would appoint an auditor without consent of parties. Though all the court were of opinion that it would be highly useful to refer the case to an auditor, and that a report would much facilitate the trial, and though the terms of the statute are very general, that "whenever a cause is at issue," &c., yet a majority of the court, looking at the particular terms of the act, put a construction upon it, which excluded from its provisions the case then under consideration, against the opinion of Mr. Justice Putnam, who held, that it was the intention of the legislature to authorize the court to appoint auditors in all cases, whether of contract or tort, where there was a necessity for such an examination of a great number of particulars, as could not be made by a jury, in the ordinary course of a trial, with any reasonable degree of certainty, as to the accuracy of results. The enlarged construction put upon the statute by Mr. Justice Putnam, would enable a court of law to avail itself of the aid of an auditor in cases involving an inquiry into particulars and details, in a manner similar to that in which a court of chancery is assisted by the services of a master.

But the inquiry, in the present case, is not in regard to the power of appointing an auditor, but in regard to the power of an auditor, properly appointed. The name has probably occasioned some misapprehension as to the power of an auditor. It seems to have been supposed that an auditor, under

the statute, was the same as the auditor in the action of account at common law. But they are the same only in name. The powers of the one are by no means the measure of the powers of the other. In *Fanning v. Chadwick*, 3 Pick. 420, 424, Mr. Justice Wilde, in giving the opinion of the court, says: "It has been argued, that the only remedy at law, if any, is by action of account; but this action is almost obsolete, even in England, and there seems to be no necessity for reviving it here. Justice may be administered in a form more simple, and less expensive, by an action of assumpsit; especially since the court is authorized to appoint auditors. Assumpsit has now all the advantages, without the disadvantages, peculiar to an action of account." One of the disadvantages peculiar to an action of account, here referred to, it would seem, must have been the limited power of the auditor, which was removed by the enlarged power given under the statute. The above case was under the statute of 1817. The present case is under the revised statutes, the provisions of which are more full and complete, and which will now be more particularly considered.

The court are authorized to appoint one or more auditors: This enables the court to appoint such persons, and such a number of persons, as will be in every way safe and competent for the accomplishment of the business in hand, under the circumstances of each particular case. Whatever power the auditors may be held to possess, the court will see to it, that it shall be in every case intrusted to fit and competent hands, though their report is only *prima facie* evidence, and not necessarily conclusive. The auditors are to hear the parties, and of course they are to hear them for the purpose of deciding such matters as may be heard.

But in regard to what matters are the auditors to hear the parties, and to examine their vouchers and evidence? In the words of the statute, "they are to hear the parties;" in the most general terms; they are to hear them as to every thing, without limit, and without restriction, bearing upon the matter which they have in charge, and the duty which they have to perform; that is, taking and stating an account. They

are to hear them upon every thing material in relation to the account; every thing proper to be considered in deciding upon the merits of the claims of the respective parties. They are not only to examine vouchers, but evidence in relation to all questions arising in the investigation of accounts.

The statute further provides, that when there is more than one auditor, they shall all meet and hear the cause, but a report by a majority of them shall be valid. Here they are to hear the cause; not merely examine vouchers, and add up and subtract figures, but hear the cause, the whole cause; every thing appertaining to the matter of stating the account. The provision, for compelling witnesses to attend and testify before auditors in the same manner as before arbitrators and referees, gives to auditors the means of investigating accounts as fully, and in the same manner, as may be done by arbitrators and referees; and, providing the means, would seem to indicate that the auditors have the power of making such examination. So far as respects the investigation of accounts, therefore, the power of auditors is as general and extensive as that of arbitrators and referees; though their report is only *primâ facie* evidence, and not conclusive and binding as an award.

The statute further provides, that "the report of the auditors, if there is no legal objection to it, may be used as evidence on the trial before the jury; but it may be impeached and disproved by other evidence, produced on the trial by either party." It is but *primâ facie* evidence; but it is *primâ facie* evidence, and may change the burden of proof. But of what is it evidence? The statute does not say it shall be evidence, in a restricted sense, as to the vouchers or computations merely, but shall be evidence, in general terms; evidence of every thing properly considered by the auditor in stating the account, and of the true and just state of the account between the parties. Whatever the auditor finds necessary to do in the proper discharge of his appropriate duties, may be embraced in his report of his doings; and his report is evidence upon the trial before the jury.

It has sometimes been said, that when a question arises before an auditor, he should leave it open, to be decided by

the court and jury, and state the account in different ways, so as to meet such decision as may be made. There doubtless may be some cases, in which it might be suitable for the auditor to make different statements of the account, to meet the ultimate decision of some question; but then there may be many cases, in which it would be exceedingly perplexing, if not wholly impracticable, for an auditor to state the account in such various ways as to meet the ultimate possible decision of the various questions raised in the case. But it is sufficient that the statute does not require the auditor to make more than one statement of the accounts. He is to hear the parties, examine their vouchers and evidence, and state the accounts according to his view of the merits of the respective claims of the parties, upon a consideration of all the matters before him; and his report of his doings is evidence upon the trial. Such seems to be the general power of the auditor, as given by the statute, in the exercise of which he is enabled to afford essential aid to the court in the administration of justice; and there is no reason why the court should destroy or impair his usefulness, by imposing limitations and restrictions upon his authority, which have not been imposed by the legislature.

These general views, as to the authority of an auditor, are sustained by the decisions in particular cases in this court. In the case of *Bradley v. Clark*, 1 Cush. 293, it was decided, that an auditor might hear and decide the question, whether or not goods charged in account were received and purchased on a barter account, as being "directly within the range of inquiry, and of course within the scope of his authority." In the case of *Jones v. Stevens*, 5 Met. 373, the decision turned upon the particular facts and circumstances of that case, and does not throw any light upon the inquiry as to the general powers and duties of an auditor. In the case of the *Commonwealth v. Cambridge*, 4 Met. 35, it was held, that an auditor might hear and decide the question as to the value of labor which was the subject of an account referred to him. In the case of *Barnard v. Stevens*, 11 Met. 297, it was held to be within the scope of the authority of an auditor, to hear and decide whether or not certain notes were due by the defendant

to the plaintiff; and that his report was *prima facie* evidence that the notes were due.

By a statute of Vermont, it is provided that the action of account may be sustained, among other things, on book account. It is further provided that, when judgment to account is rendered, "the court shall appoint one or more judicious and disinterested men, to hear, examine and adjust the accounts between the parties." The persons so appointed are called auditors. In the case of *Stoddard v. Chapin*, 15 Verm. 443, it was decided, that "it is the duty of auditors to decide upon all questions of fact arising in the investigation of an account, and to deduce all inferences of fact which may be legitimately drawn from the evidence." The same doctrine has been repeatedly and fully held in numerous decisions in the same court, though the report of the auditor is there binding and conclusive as an award of referees. So in the case of *Brown v. Kimball*, 12 Verm. 617, it was held, that "when the plaintiff seeks to recover for labor, the particular terms of the contract under which the labor was performed, and whether the plaintiff fulfilled, or voluntarily abandoned his contract, are questions of fact, to be conclusively determined by the auditor."

But it is not necessary further to extend the inquiry as to the general powers and duties of auditors. The question now before the court, and to which alone the decision of the court applies, is a very simple one. The question is, whether it was within the power of the auditor to hear and decide the question, whether Ray was the authorized agent of the defendant, to make the purchases, on his account, of the goods charged in account against him, by the plaintiff. It is very clear that, if the auditor had not power to settle that question, he had no power to do any thing. The auditor was to state the account between the parties; but whether or not there was any account between them, depended upon the question whether Ray was the defendant's agent to make the purchases on his account. If Ray had no such authority, then the defendant had purchased no goods of the plaintiff, and there was no account between them. It was quite impossible therefore for the

Clark v. Hatch.

auditor to state the account between the parties, without deciding whether or not there was any account between them to be stated. It was, in fact, simply deciding, whether the defendant purchased the goods charged against him by the plaintiff, which was clearly within the scope of the authority of the auditor.

Exceptions overruled.

THOMAS CLARK vs. HORACE HATCH.

A citizen of this state gave a note to the treasurer of the state of Connecticut for rent of land situate in this state, owned by that state, and leased to him by an agent of that state. It was held, in an action on the note, that the discharge of the maker, under the insolvent laws of this state, was not a bar to the action; the claim not having been proved under those laws.

METCALF, J. This is an action on a note of the following tenor: "Lee, Aug. 30, 1845. For value received, I promise to pay Joseph B. Gilbert, Esq., treasurer of the state of Connecticut, or his successor in said office, one hundred dollars and seventy five cents, on demand, with interest. Horace Hatch." The defendant relies on a discharge under our insolvent laws; and the question, whether that discharge can avail him, has been submitted to the court upon an agreed statement of facts, in substance as follows:

The state of Connecticut is the owner of the note in suit. That state owns lands in this county, and has an agent in the town of Lee, duly authorized to lease those lands and to receive payment of rent; and payment of notes, given for rent, has been usually made to him. The note in suit was given, at Lee, for rent of a part of those lands, leased by said agent to the defendant. The payee of the note was, at its date, treasurer of the state of Connecticut, and the plaintiff is his legal successor in that office; both always having been citizens of that state. Since the note was given, proceedings in insolvency have been instituted against the defendant, and he has

been duly discharged under the insolvent laws of this commonwealth. But the note in suit was not proved, as a claim against his estate, under said proceedings.

On these facts, the court are of opinion that the plaintiff is entitled to judgment.

The cases of *Savoie v. Marsh*, 10 Met. 594, *Fiske v. Foster*, 10 Met. 597, and subsequent cases, have settled the point, that contracts between citizens of this state and citizens of another state, are not affected by a discharge of the debtor under our insolvent laws, unless the creditor elects to prove his claim and take his dividend under those laws. The contract in question was made, either with the payee, who was a citizen of Connecticut, or with the state of Connecticut; that is, with all the citizens of that state. In either case, the defendant is not discharged from his liability to fulfil that contract.

As no question has been raised, concerning the right of the plaintiff, as successor of the payee in the office of treasurer, to sue in our courts in his own name, we have not considered that question.

Judgment for the plaintiff.

W. Porter and F. Chamberlain, for the plaintiff.

J. E. Field, for the defendant.

BENJAMIN W. PETTIS vs. AUSTIN W. KELLOGG & others.

Where personal property mortgaged was described as "all the staves I have in Monterey, the same I had of Moses Fargo;" and it appeared, in evidence, that the mortgagor had no staves in Monterey, but had a quantity in the adjoining town of Sandisfield, near the boundary of Monterey, which he had of Moses Fargo, it was held that the first part of the description might be rejected, as false, and that the remainder was sufficient to pass the property.

If a mortgage of personal property is made as security for the payment, "according to its tenor," of a promissory note, payable at a day certain, which has passed, the condition must be understood to be the payment of the note in its then existing state.

The owner of a quantity of staves made an agreement to sell and deliver them - and that when they were all delivered, the purchaser should give good security therefor; the purchaser, after delivery of a portion of the staves, and payment

Pettis v. Kellogg & others.

of a portion of the purchase money, made a mortgage of all the staves. It was held, that the property in the staves did not vest in the purchaser, until the delivery was completed, and the security given; that the mortgage was therefore void, so far as respected the staves not then delivered; and that it was not rendered valid by the subsequent completion of the delivery and giving of security, as against attachments made still later by the creditors of the original owner.

It is no sufficient objection to the validity of a demand, made by a mortgagee of personal property, upon an officer attaching the same as the property of a mortgagor, that the demand is signed by attorney; or that it states a claim of title under a pledge, as well as under the mortgage.

THIS was an action of trespass for taking and carrying away a quantity of staves, the property of the plaintiff. The defendants pleaded the general issue, with a specification of defence that the defendant Kellogg, as deputy sheriff, on the 10th of January, 1850, attached the staves, as the property of Phineas Pettis, on a writ sued out against said Phineas, by Henry K. Buel and others; and the other defendants justified as his servants.

At the trial in the court of common pleas, before *Byington, J.*, the plaintiff put in evidence a mortgage, given to him by Phineas Pettis, on the 24th of December, 1849, and recorded the same day, of the property in question, describing it as "all the staves I have in Monterey, the same I had of Moses Fargo," and conditioned to pay a note therein mentioned, according to its tenor, which note, dated the 27th of May, 1848, and payable to Eunice Pettis, or bearer, in six months from its date, the plaintiff also put in evidence, and offered evidence that he owned the note at the time the mortgage was given.

The defendants objected that the mortgage was void, because the condition was impossible, namely, to pay a note, according to its tenor, which was overdue. This objection was overruled.

They also objected that the mortgage was void for uncertainty in the description of the property. It appeared in evidence, that the said Phineas, at the time he gave the mortgage, had no staves in Monterey, but had staves which he had bought of Moses Fargo, and which were then in Sandisfield, near the boundary line between the two towns. The court ruled, that although the description was erroneous in mention-

ing the property as situated in Monterey; yet, as it was in other respects correct, in describing the staves, as bought of Moses Fargo; if, by such description, the property was capable of being identified, and was so identified by testimony, the description was sufficient to pass the property.

The defendant then objected that the said Phineas had no such property in the staves, that he could make a valid mortgage of them at the time this mortgage was made; that though he had contracted for the purchase, the title and property had not vested in him. On this point, after the plaintiff had called Phineas Pettis as a witness, the defendant called Moses Fargo, who testified, that prior to the date of the mortgage, he sold Phineas Pettis a lot of staves, and was to deliver them to him; and when delivered, Phineas was to satisfy him with good security; that he delivered two loads, on the 21st and 22d of December, 1849; that he drew them from Sandisfield to New Marlborough, where Phineas Pettis lived; that Phineas was to pay something on the delivery of the first load, and did accordingly pay then eight dollars on account of the staves generally; that after the 24th of December, the residue of the staves were delivered; and when all were delivered, Phineas settled for them by giving satisfactory security; that Phineas, at the time of the contract, examined the staves, which were then lying in one heap; and, after examining them, made the contract before stated. The staves were all included in the mortgage, as well those delivered before, as those delivered after, the 24th of December; but those only were attached, which were delivered after that day, and they were not attached until after security was given for payment of them to Fargo, to his acceptance. The defendant objected, that the staves had not been delivered at the time of making the mortgage, and that the property remained in Fargo; and that, until satisfactory security was given to him for the payment, Phineas had no such property in the staves, that he could make a valid mortgage of them. But the court ruled, that if the jury found the facts to be as testified to by Fargo, then Phineas had such an interest in the staves, that he might make a valid mortgage of them, as against the defendants.

The plaintiff then introduced a written notice and demand, signed in his behalf by his attorney, dated the 1st of February, 1850, and duly served on the defendant Kellogg, on the same day. In this notice, the plaintiff stated that he claimed to hold the property, by virtue of the mortgage above mentioned, and also by virtue of a pledge from the mortgagor. The defendant objected to the sufficiency of the notice among other reasons, because it was signed by attorney, and because the claim to hold the property by virtue of the pledge was ineffectual. But the judge ruled that the notice was sufficient.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. N. Emerson, for the defendants, cited, to the point that the property in question was not sufficiently described in the mortgage, *Bullock v. Williams*, 16 Pick. 35; *St.* 1843, c. 72, § 2; *Whiting v. Dewey*, 15 Pick. 434; *Tyler v. Hammond*, 11 Pick. 212; *Moore v. Magrath*, Cowp. 9; 2 Bl. Com. 381; *Cutler v. Tufts*, 3 Pick. 272; *Worthington v. Hylyer*, 4 Mass. 205; and to the point that the mortgagor had no property in the staves, which he could convey, at the time of giving the mortgage, *Jones v. Richardson*, 10 Met. 481, 493; 2 Kent. Com. (6th ed.) 494; *Hanson v. Meyer*, 6 East, 614; *Barrett v. Pritchard*, 2 Pick. 516; *Hussey v. Thornton*, 4 Mass. 405; *Marston v. Baldwin*, 17 Mass. 606; *Barrow v. Coles*, 3 Campb. 92; *Reed v. Upton*, 10 Pick. 522; *Whitwell v. Vincent*, 4 Pick. 449.

I. Sumner, for the plaintiff, cited, to the point of the sufficiency of the description, *Harding v. Coburn*, 12 Met. 333; *Winslow v. Merchants Ins. Co.* 4 Met. 306; 1 Greenl. Ev. § 288; *Barry v. Bennett*, 7 Met. 354; and to the point that the mortgagor had such a title in the staves, at the time of making the mortgage, as to give effect to the latter, *Riddle v. Varnum*, 20 Pick. 280; *Potter v. Washburn*, 13 Verm. 558.

DEWEY, J. The title of the plaintiff is that of mortgagee, by virtue of a mortgage from Phineas Pettis, bearing date December 24th, 1849, which mortgage was duly recorded on the same day. Is this mortgage a valid one, and effectual to pass the property to the plaintiff in the articles now in controversy?

1. It is objected to the validity of this mortgage that the articles are not sufficiently described in the mortgage. As to the objection arising from the generality of the description, "all the staves I had of Moses Fargo," it has often been a subject of consideration by this court, and is now the well settled doctrine, that it is no sufficient objection that the articles are thus generally described. *Winslow v. Merchants Ins. Co.* 4 Met. 306; *Harding v. Coburn*, 12 Met. 333. The further objection, that this mortgage must be confined to the staves of the plaintiff that were then in the town of Monterey, and that it can not be held to embrace those that were in the adjoining town of Sandisfield, though near the dividing line between that town and Monterey, is one of more difficulty, and to be met only by taking the rule of construction often applied to conveyances of real estate, namely, that of rejecting a particular description which is clearly false, in order to give effect to other descriptive words, which of themselves sufficiently describe the object intended to be conveyed. The entire description is this: "All the staves I have in Monterey, the same I had of Moses Fargo." Now it is agreed that the mortgagor had no staves in Monterey, but the staves he had of Moses Fargo were in the adjoining town of Sandisfield. If we reject this false recital as to Monterey, we have yet left a full and sufficient description of the articles, namely, "all the staves I had of Moses Fargo." True, you must go out of the description and show by other facts, which were the staves that the mortgagor purchased of Moses Fargo; and this would have been equally necessary, had the whole description been correct and truly recited. It seems to us, that this is one of those cases, where the property may be held sufficiently described after rejecting the false recital, and one where, upon sound principles, such false recital may be rejected, to give effect to the contract.

2. The objection taken at the trial that the mortgage was invalid, because the condition was impossible, it being to pay a promissory note, "according to its tenor," when the note was payable at a day certain, which had already past, is not farther urged. It could not avail; as the obvious purpose of the parties was to secure the payment of the note thus de-

scribed, which, on its face, was a note overdue; and the condition of the mortgage must be understood to have been the payment of the note in its then state, which was virtually the same as a note payable on demand.

3. It is then further objected that, at the time of the execution of the mortgage, the mortgagor was not the owner of the property attempted to be conveyed in mortgage, and that his interest therein afterwards acquired cannot avail the mortgagee, so as to enable him to hold the same under the mortgage. This subject has recently been fully considered by this court, and the result stated in the opinion of the court, in the case of *Jones v. Richardson*, 10 Met. 481, where it was held, that a mortgage of goods, which the mortgagor does not own when the mortgage is made, though he afterwards acquire them, is void as against his attaching creditors. The further inquiry, upon this point, is as to the facts to which this legal principle is now sought to be applied. These are stated in the testimony of Moses Fargo, from which it appears, that the property now in controversy had not been delivered to the mortgagor at the date of the mortgage; that it was parcel of a quantity of staves that he had contracted to sell and deliver to the mortgagor; but that when delivered, the vendee was to give him good security therefor. Some portion of the staves, not now the subject of controversy and not attached, had been delivered to the vendee. In this state of things, the mortgage was made. There had not been, in the opinion of the court, at this time, a transfer of the property. It was only an executory contract between Fargo and the mortgagor, as to the staves; the property in Pettis being dependent upon the delivery yet to be made by Fargo, and upon the condition of payment or security for the same, to be made by the vendee. Until this took place, the property was in Fargo. The question of property in these articles may be tested, by supposing a creditor of Phineas Pettis to have attached the same as his property, while in Sandisfield, and yet undelivered to Pettis. Could not Fargo have asserted a paramount claim to this property? Most clearly he might. We do not perceive that the delivery, after the execution of the mortgage, and the giving of

satisfactory security for the payment of the articles, can operate retrospectively, and give effect to a mortgage previously executed. The acquisition of title, by the delivery and payment, or giving security, presents no stronger case than any other subsequent purchase of articles described in the mortgage, but not then owned by the mortgagor, which in the case just cited was held insufficient. It would have been competent for the parties, by a new delivery and pledge after the articles became the property of Phineas Pettis, to have given Benjamin W. Pettis a valid lien upon them as security for the same debt as that described in the mortgage; but in such case the party would hold under the lien. It was said in the argument, that such was the case here, but that does not appear in the bill of exceptions. It will be fully open to the defendants on a new trial.

4. We perceive no valid objection to the form of the notice given by the mortgagee to the attaching officer. That the plaintiff claimed also, in his notice, that he had a lien by a pledge as well as a mortgage, did not vitiate the notice.

But the ruling, that the property was sufficiently vested in the mortgagor to authorize him to convey the same in mortgage, upon the facts stated in the report of the case, was erroneous, and to that extent the *Exceptions are sustained.*

MARY PRATT vs. JOSEPH W. RUSSELL.

The maker of a promissory note, who had been discharged therefrom in bankruptcy, being asked by an agent of the holder to give a new note for the debt, declined to do so, but added: "I have always said, and still say, that she shall have her pay." It was held, that a jury might properly construe these words as a distinct and unequivocal promise to pay the note.

THIS was assumpsit on a promissory note. The defendant specified in defence, and proved, a discharge under the United States bankrupt act; to avoid the effect of which the plaintiff relied on a new promise, made since the discharge, to pay the

note; and called a witness, who testified, that at the request of the plaintiff, he called on the defendant, and looked over with him the accounts between the parties; that he told the defendant that the plaintiff wanted him to do something about this note; that she would be glad to have him give a new note; that she wanted the old note in such shape that she could get it some time or other; that the defendant answered, that he was not willing to put the principal and interest into a new note, but said that he had always said, and still said, that she should have her pay; that the witness then remarked that if he was not willing to put it all into a note, he ought to indorse on this note the balance due him on the accounts; which with the defendant's consent was then done.

The defendant thereupon contended that to revive the debt, the plaintiff must prove an express and unequivocal promise to pay it, made by the defendant since the discharge; that no such promise could be legally or properly implied from the language of the defendant, as testified to by the witness; and that there was no evidence in the case sufficient to warrant the jury in finding such express and unequivocal promise, and requested the court of common pleas so to instruct the jury.

But *Byington, J.*, before whom the case was tried, declined so to instruct the jury, but did instruct them that, to entitle the plaintiff to recover, he must prove a distinct and unequivocal promise to pay the note by the defendant, after his discharge in bankruptcy; that no precise form of words was necessary, but that when words used were relied on as showing such promise, they must be such words as were capable of meaning or expressing such promise, and must appear to have been used by the party with the intention of making a promise to pay the note. And the judge was of the opinion that the words used were capable of meaning or expressing such a promise, and left it to the jury to say whether the defendant intended, by the words he used, to promise to pay the note.

A verdict having been returned for the plaintiff, the defendant alleged exceptions.

E. Merwin, for the defendant. The plaintiff must prove a

distinct and unequivocal promise to pay the debt. *Merriam v. Bayley*, 1 Cush. 77; *Moore v. Viele*, 4 Wend. 420; *Depuy v. Swart*, 3 Wend. 135, 139; 1 Steph. N. P. 695. The evidence offered did not prove such a promise. *Mucklow v. St. George*, 4 Taunt. 613; *Fleming v. Hayne*, 1 Stark. R. 370; *Lynbui v. Weightman*, 5 Esp. R. 198; *Jones v. Moore*, 5 Binn. 573, 580; *Thompson v. Lay*, 4 Pick. 48; *Ford v. Phillips*, 1 Pick. 202; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Atwood v. Coburn*, 4 N. H. 315; *Bangs v. Hall*, 2 Pick. 368, 377. The ruling of the court was inconsistent, and improperly left to the jury to decide upon the legal effect of the evidence. *Fiske v. Needham*, 11 Mass. 452, 456; *Miller v. Lancaster*, 4 Greenl. 159; *Bicknell v. Keppel*, 1 New Rep. 20; *Atwood v. Coburn*, 4 N. H. 315; *Rice v. Dwight Man. Co.* 2 Cush. 80.

J. D. Colt, for the plaintiff, cited *Chit. Con.* 47, 73; *Gould v. Shirley*, 2 Moore & Payne, 581; *Colledge v. Horn*, 3 Bing. 119; *Buswell v. Roby*, 3 N. H. 467; *Swann v. Sowell*, 2 B. & Ald. 759, 763.

SHAW, C. J. We cannot perceive any objection to the directions given to the jury. Undoubtedly to revive a debt barred by a statute discharge, an express promise is necessary, in contradistinction to a promise implied from an acknowledgment of the existence of the debt. So the judge directed. But the evidence tended to prove two forms of expression used by the defendant, on the same occasion; one declining to give a written promise, the other amounting to a verbal promise. The words, as he must have used them in the present tense, in answer to a claim of payment to be made by him, "I have always said, and still say, that she shall have her pay," are capable of being construed a promise, but might be counteracted by the other expression. It was for the jury to decide upon the credit of the witness, and the accuracy of his recollection, and thus decide what was said.

Exceptions overruled.

LEWIS KELLENBERGER & others vs. DANIEL STURTEVANT..

An acknowledgment in writing of the demandant's title, made by the tenant in a writ of entry, is sufficient evidence of the demandant's title to be submitted to the jury in a subsequent action of trespass brought by him against the tenant for an entry on the land described in the writ of entry.

This was an action of trespass *quare clausum fregit*. At the trial in the court of common pleas, before Byington, J., the plaintiffs, to prove their title, offered in evidence an original writ of entry sued out by them, describing themselves as the heirs and children of one Elijah M. Paddleford, deceased, against the defendant, on the 13th of June, 1843, to recover the same land described in the writ in the present action, and duly served on that day. On the back of said writ of entry the following agreement was indorsed: "The tenant in this suit, Daniel Sturtevant, acknowledges the title in the within premises, in the demandants, and he gives up peaceable possession of the same to the demandants, and pays the writ and service of this suit, and the same is discontinued by agreement of parties. Pittsfield, Sept. 5, 1843.

"P. L. HALL, Attorney to demandants.

"DANIEL STURTEVANT."

The plaintiffs also introduced a witness, to prove that the plaintiffs in this case were the children and heirs of Elijah M. Paddleford, deceased, who testified as follows: "The defendant once spoke of one of the heirs of Paddleford coming up to Savoy; he asked me if I was the agent of Paddleford's heirs; I should think he talked a number of times about the heirs, but cannot tell the words."

The presiding judge ruled that the evidence introduced by the plaintiff was insufficient to prove the death of Elijah M. Paddleford, and that the plaintiffs were his heirs at law; and that from this evidence, the jury could not lawfully find the title to be in the plaintiffs. The plaintiffs thereupon abandoned this ground of recovery, and claimed to recover on the ground of possession. The evidence on this point was submitted to the jury, who found a verdict for the defendant.

Kellenberger & others v. Sturtevant.

Whereupon the plaintiffs excepted to the ruling of the judge on the insufficiency of the evidence to prove their title.

J. S. Page, for the plaintiffs.

J. C. Wolcott, for the defendant.

BIGELOW, J. The bill of exceptions in this case seems to show, that the question of title to the estate, upon which the alleged trespass was committed, was at issue between the parties, and formed a material part of the plaintiffs' case, from which they were precluded by the ruling of the court. This being so, it follows, as a necessary consequence, that the court erred in withdrawing the testimony on this point from the jury. The plaintiffs proved a clear and unequivocal admission by the defendant in writing, made under circumstances which gave it great force and significance, of facts material and relevant to this part of the case; and upon the most familiar principles, the evidence, upon which it was the exclusive province of the jury to pass, should have been submitted to their consideration. Indeed, we are at a loss to know what better or more conclusive proof of title could have been offered by the plaintiffs, than the direct admission of the defendant of the fact, made in writing, upon the settlement of an action brought to establish the title in the plaintiffs as against the defendant, entirely unexplained and uncontrolled, as it seems to have been, by any other evidence offered at the trial.

It was urged at the argument, by the counsel for the defendant, that as the right of the plaintiffs to recover on the ground of possession, was submitted to the jury, and a verdict on that point found for the defendant, the ruling of the court, as to the evidence of title, became immaterial. It is undoubtedly true, that the gist of the action of trespass is the injury done to the plaintiffs' possession. But it is equally true that, even in trespass *quare clausum*, the possession may be, in a certain sense, constructive as well as actual, and the title to the premises may have a material bearing on the question of possession. If, for instance, the premises rightfully belonged to the plaintiffs, but were in the actual occupation of no one, or were occupied by a tenant at will, or at sufferance, under them,

Stevens v. Cole.

then they might maintain trespass, as for an injury to their own possession, as against a stranger, and the proof would maintain the averment. 2 Greenl. Ev. § 614; 1 Chit. Pl. (6th Am. ed.) 177, note; *Van Brunt v. Schenck*, 11 Johns. 385; *Starr v. Jackson*, 11 Mass. 519.

The case, as stated in the bill of exceptions, does not show the facts sufficiently to enable us to judge how far the question of title was material in its bearing on the point submitted to the jury, and we are therefore compelled to send the case to a new trial, because the plaintiffs were shut out by the ruling of the court from a part of their case, which might have very materially affected the result. *Exceptions sustained.*

ALMON STEVENS vs. JOHN M. COLE.

The father of an infant, interested in the estate of a deceased person, having himself no adverse interest therein, may petition the judge of probate, as the next friend of the infant, for leave to sue the administration bond.

A devisee of real estate, having only a contingent estate therein, or a present interest, defeasible upon a condition subsequent, is not entitled to bring an action on the administration bond.

Whether a devisee of real estate is a person interested in the estate of a deceased testator, and entitled as such to bring an action on the administration bond, within the provision of the Rev. Sts. c. 70, § 6, *quære*.

THIS was an appeal from a decree of the judge of probate, disallowing the appellant's petition for leave to sue the bond of the appellee, as administrator, with the will annexed, of Stephen Bacon, deceased. The case was submitted to the court upon an agreed statement of facts.

Stephen Bacon, by his will, devised to his grandchild, the appellant, who was now a minor of eleven years of age, a lot of land, "to have the same after he comes of age, to him and his heirs and assigns;" with the further provision, "that, if the said Almon Stevens die under age or without heirs, the real estate devised to the said Almon is to go to the other

grandchildren, devisees in the will, in equal proportions." The use of said real estate was, in the mean time, devised to a son of the testator.

The petition was in the name of Daniel Stevens, describing himself as "the next friend of his minor son, Almon Stevens," one of the devisees under the will of Stephen Bacon, and was signed by Daniel Stevens alone.

The reasons of appeal, filed by the appellant, by Daniel Stevens, his next friend, were, that the said Cole, administrator as aforesaid, had "neglected to sell, and appropriate to the payment of the debts of the said testator, the property specially set apart for that purpose, and ordered to be applied in and by said will, and suffered the lands of the devisees of said Stephen Bacon to be sold for the payment of said debts, all which was contrary to the provisions of the will of the said Stephen."

I. Sumner and T. Robinson, for the appellant. The devise to Almon Stevens vested in him on the death of the testator. *Ballard v. Ballard*, 18 Pick. 41; *Cowdin v. Perry*, 11 Pick. 503; *Emerson v. Cutler*, 14 Pick. 108; *Nash v. Cutler*, 16 Pick. 491; *Furness v. Fox*, 1 Cush. 134. A minor may sue by his father, as next friend. *Miles v. Boyden*, 3 Pick. 213. If a recovery should be had upon the bond, the proceeds would remain in the custody of the law, and be subject to the order of the judge of probate. Rev. Sts. c. 70, §§ 10, 11.

H. L. Dawes, for the appellee.

DEWEY, J. A preliminary objection to the maintaining of this petition was taken as to the form in which the petition appears; it being made by the father of the devisee, as *prochein ami*. Infants must appear in suits at law either by guardian or *prochein ami*. When under guardianship, except in suits against their guardian, such suits are ordinarily brought by them as suing by guardian. At the common law, infants were required to sue by guardian. The statutes of Westm. 1, c. 48, and Westm. 2, c. 15, authorized infants to institute suits by *prochein ami*; and, whether by guardians or *prochein ami*, it seems formerly to have been done under a special order of the court, admitting the party thus to sue. It seems

now however to be so much a matter of course, that it has been considered as sufficient, if it be recited in the process, that it is thus instituted, by guardian or *prochein ami*, thereto admitted by the court. *Archer v. Frowde*, 1 Stra. 304. We have no statute on the subject; but our practice has been to permit the suit, as a matter of course, when a party had • no guardian, to be brought by a *prochein ami*, and no evil has resulted from this practice, so far as we know. The name of a *prochein ami* being thus introduced into the process, without any previous order or sanction of the court, the power of supervision, so far as to prevent either an unauthorized use of the name of one as a *prochein ami*, or the improper institution of a suit by a volunteer *prochein ami*, in disregard of the interest of the infant, must of course remain with the court, to be exercised on a motion to stay proceedings, or dismiss the action; and to this extent the court will control the use of the name of a *prochein ami*. The present proceeding is, in the probate court, on an application to institute a suit on a probate bond. We perceive no sufficient objection to instituting this petition in the name of a *prochein ami*, the infant having no guardian, and the party whose name appears as *prochein ami* standing in the relation of father to the infant, and with no adverse interest to that of the infant.

The next objection taken to granting to the petitioner authority to institute the suit upon the probate bond, is the want of any such present interest in Almon Stevens, the minor, as devisee under the will of Stephen Bacon, as will authorize him to enforce, through the bond of the administrator with the will annexed, any claim for damages for neglect of duty in the discharge of his office as such administrator. The devise to Almon Stevens is of certain lands, particularly described in the will; and he is "to have the same after he comes of age, to him, his heirs and assigns, for ever;" with the further provision, "that, if the said Almon Stevens die under age, or without heirs, the real estate devised to the said Almon is to go to the other grandchildren, devisees in the will, in equal proportions." It is admitted that Almon Stevens is now only eleven years of age, and the inquiry is, whether

his interest is of such a character, in the lands alleged to have been improperly sold by the administrator, as will authorize any claim on his part, to institute an action against the administrator. From the form of the devise, as above recited, it is quite obvious, that it is entirely uncertain whether the estate can pass to him to be enjoyed as his own. That depends upon his arriving at the age of twenty one years, or having lawful heirs. It is either a contingent estate, or a present interest, defeasible upon a condition subsequent. The cases cited for the petitioner want the contingency attached to this by the limitation over, in case of dying under age or without issue. They show that the devise, taking effect after a previous devise for years or life, will not render it less a vested estate. But where a proviso similar to this is found, as in *Cowdin v. Perry*, 11 Pick. 503, it is held, that no certain estate passes by the devise, but the same is at least defeasible, if the devisee should not arrive at the age of twenty one years, and leave no issue.

How, then, can he at this time, be entitled to enforce any claim to this estate, or recover damages of the administrator for maladministration. For aught he can know, the estate in him may wholly fail. But if this action is maintained, and a recovery had against the administrator, the avails of the judgment will be enjoyed by Almon Stevens, to the prejudice of those who may, under the will, come to the possession and ownership of the estate. It was not the intention of the testator that any interest should be vested in Almon Stevens, before the happening of one of the contingencies upon which the estate was given him; the use having been absolutely given to another until he should arrive at the age of twenty one years. Upon this state of the case, the court are of opinion, that the petition is prematurely brought, and that it should be dismissed.

Upon the further question, whether a devisee of real estate is one of the persons within the provision of Rev. Sta. c. 70, § 6, and as a party aggrieved might cause the administrator's bond to be sued for his benefit, we express no opinion.

Petition dismissed.

Hodskin v. Cox & another.

WILLIAM HODSKIN vs. THOMAS COX & another.

A receiptor for property attached agreed by the terms of his receipt to redeliver it on demand to the officer, at a place named; and also that, if no demand should be made, he would, within thirty days after judgment in the action, redeliver the property, as aforesaid, that it might be taken on execution. It was held that, although no demand was made, he was liable on his receipt, if he failed to redeliver the property at the place named, within thirty days after judgment.

THIS was an action on the case for a breach of the following agreement:

"Berkshire, ss. July 12th, 1848. Received of William Hodskin, deputy sheriff, for safe keeping, the goods and chattels following, viz., [Here followed a description of the property,] of the value of two hundred dollars, which property the said officer has taken by virtue of a writ against W. W. Green, in favor of Charles Thompson et al., returnable at the August term of the court of common pleas for the county of Franklin, 1848; and, in consideration of one dollar, paid us by the above-named officer, the receipt whereof we do hereby acknowledge, we hereby promise and agree safely to keep and redeliver all the property above mentioned to the said officer, or his order, or to his successor in office, on demand, to be delivered at said Hodskin's store, in Adams, in the like good order that the same is now in, free from all charge and expense to the above-named officer or the creditor aforesaid; and we agree that a demand on us shall be considered as binding on us; and we further agree, that if no demand be made upon us, we will, within thirty days from the rendition of judgment in the action aforesaid, redeliver all the above-described property, as aforesaid, that the same may be taken in execution. Thomas Cox, David Walley."

The case was submitted to the court of common pleas, and upon appeal to this court, upon the following statement of facts: The property attached was left in the possession of Green, the defendant in that action, upon and by reason of the giving of the above receipt. No dollar was actually paid by the defendants to the plaintiff upon the giving of this receipt. Judgment was rendered in the action of *Thompson v. Green*, on the 25th of November, 1848, and execution issued thereon on the 4th of December, and was put into the hands of the plaintiff on the 6th, who was ready with the execution at all times afterwards, at his store in Adams, to receive the property in question upon the execution, and who, on the 29th of the same month, demanded the property of the defendants. On the 25th of said December, Green, on the peti-

Hodakin v. Cox & another.

tion of his creditors, was declared insolvent, and a warrant issued against his estate, which, on the 27th of December, was delivered to a messenger, and served by him, by taking possession of all Green's property, and giving him notice. The first publication of notice was made on the 4th of January, 1849. The plaintiff had notice of the warrant before bringing this action. If the court are of opinion that the plaintiff can recover, judgment is to be rendered for the amount of the judgment recovered against Green, and costs; if otherwise, for the defendants.

H. L. Dawes, for the plaintiff.

W. Porter, for the defendants.

SHAW, C. J. This case seems to be settled by the terms of the receipt, which differ essentially from those ordinarily given by receiptors of property attached on mesne process, to the attaching officer. Commonly, notice and demand are necessary, because the fact, that the judgment has been rendered and execution issued, lies more in the knowledge of the officer than of the receiptor. But, in the present case, the defendants took upon themselves to know when judgment should be entered, and within thirty days from that day to deliver the goods at the plaintiff's store; and the case finds that the plaintiff was there with the execution, ready to take them. The obligation was, to deliver the property, at any time before or after judgment, on being demanded; but, at all events, whether demanded or not, to deliver it at the plaintiff's store within thirty days after judgment. Had it been so delivered, it would have been bound by the execution, and the right of the creditor to apply it in the satisfaction of his debt would not have been defeated by the subsequent proceedings in insolvency.

Judgment for the plaintiff.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT

FOR THE
COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN,
SEPTEMBER TERM 1851, AT NORTHAMPTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.	
HON. CHARLES A. DEWEY,	}
HON. THERON METCALF,	
HON. RICHARD FLETCHER,	
HON. GEORGE T. BIGELOW,	
	JUSTICES.

[Some of the cases from the county of Hampden, from page 539 to page 561,
were argued at the sittings in Boston, in January, 1852.]

COMMONWEALTH vs. DAVID KELLOGG & another.

An indictment for a conspiracy alleged that the defendants, on the 5th of January, 1850, conspired to defraud the H. insurance company, by removing and secreting the goods belonging to one of the defendants, and insured by said company, and then pretending that they had been destroyed by fire. The evidence was, that the policy was issued on the 2d of January, 1850; that the goods were removed on the 5th; that the shop from which they were removed was destroyed by fire on the 7th; and that the defendants had no knowledge of any insurance of the goods by the H. insurance company until after the fire. It was held, that this evidence did not support the allegation in the indictment.

This was an indictment against the defendants for a conspiracy to injure and defraud the Howard Insurance Company, a corporation duly established by law in Hartford, Connecticut.

cut, and doing business, among other places, at Lowell, in this commonwealth, by certain means set forth in the indictment.

The indictment alleged, that Kellogg, who was a merchant tailor in Northampton, on the 5th of January, 1850, conspired with the other defendant to remove Kellogg's stock of goods from his shop, and to secrete and conceal them; said goods being then insured against loss or damage by fire, by the Hamilton Fire Insurance Company, doing business at Lowell, by a policy dated the 3d of January, 1850, in the amount of \$2,000, payable, in case of loss, to one Freeman; and to pretend to the insurance company, that the same had been destroyed by fire, and thereby to injure and defraud the insurance company; that, in pursuance of said conspiracy, the defendants, on the 5th of January, 1850, removed the goods insured from Kellogg's shop, and secreted and concealed the same; that, on the 7th of January, 1850, Kellogg's shop was destroyed by fire; that, on the 9th, the defendants gave notice of the pretended loss of the goods to the insurance company, and complied with all the conditions required by the policy to be observed in order to obtain payment of the sum thereby insured; and that the insurance company were thus induced to pay, and did pay, such pretended loss, amounting to \$1,500, when, in fact, none of the goods insured were in the shop when the fire occurred, and none, in fact, were destroyed.

At the trial, which was in the court of common pleas, before Hoar, J., it appeared in evidence, that the only application for insurance to the Howard Insurance Company, signed by Kellogg in person, bore date of the first of January, 1850, and was made at the office of Gillett, the agent of the company, in Hartford, to be forwarded to the Mechanics' Company, at Worcester, in this state, for which Gillett was also an agent; that this application was forwarded and rejected; that afterwards a new application was made out, at Gillett's office, to the Howard Insurance Company, but was not signed by Kellogg personally, but purported to be signed in his name, by one Cogeshall, a clerk in Gillett's office; that this application bore date of the 3d of January, 1850,

and was forwarded to Lowell, and a policy returned and delivered to Freeman, for whose benefit the insurance was effected, and that it was by him retained; and the loss was afterwards paid to him, a written notice and statement of his loss, under oath, having been made out and signed by Kellogg, at Freeman's request, in which Kellogg claimed to be the party insured.

It was argued for the defendants, upon this and other evidence, that the defendants could not have known, as early as the evening or night of the 5th of January, (when it was contended the goods were removed from Kellogg's shop,) or by one o'clock, on the morning of the 7th of January, when the shop was burned, that Kellogg had been insured by the Howard Company, and that the defendants could, not, therefore, have intended to defraud that company; and there was evidence tending to show, that Kellogg did not, in fact, know that he was insured by the Howard Insurance Company till after the fire.

But the judge ruled, that if Kellogg applied to Gillett, as an insurance agent, to obtain an insurance payable in case of loss to Freeman, the mortgagee of the goods, without any especial desire to be insured in any particular company; and, supposing that he was insured in the Worcester company, although really insured in another, afterwards conspired with Abbott to defraud the insurers of the goods in the manner alleged in the indictment; and having no intent to defraud any particular company, except so far as they were, and by reason of their being, insurers of those goods; and upon learning that the Howard Insurance Company were, in fact, the insurers, continued to act in execution of the conspiracy; the charge in the indictment might be supported. The judge also ruled, that a general intent to defraud, although directed by circumstances to a party not originally known or contemplated by the conspirators, might be set forth, without a variance, as a conspiracy to defraud the party actually defrauded under such circumstances. The defendants, being convicted, alleged exceptions.

C. Delano, for the defendants.

Clifford, attorney general, for the commonwealth, referred to Archb. Crim. Pl. (5th Amer. ed.) 675; *The King v. Gilt*, 2 B. & Ald. 204; *The Queen v. King*, 7 Ad. & El. N. B. 782.

DEWEY, J. The object of the conspiracy must be shown by the proof to correspond with that charged in the indictment. It becomes a material allegation when it points to a particular individual or corporate body, naming them as the subjects of the conspiracy, and a variance between the allegation and the proof in such case is fatal.

In indictments for larceny, the rule has been strictly applied as to the averment of the ownership of the goods, and a mistake in this respect operates as an acquittal of the prisoner. So also in indictments for burglary, if it be alleged that the entry was with intent to commit one species of felony, and the fact appears upon the evidence to have been an entry for another and different purpose, the charge in the indictment is not sustained. 2 East P. C. 514. The like rule is stated in books of authority, as to a charge of conspiracy; where it has been held that, in an indictment for a conspiracy, the object of the conspiracy must be proved as alleged in the indictment. Roscoe Crim. Ev. 326; *Rex v. Pollman*, 2 Campb. 229, 233. The case of *Commonwealth v. Manley*, 12 Pick. 173, is to this point. The indictment charged a conspiracy to defraud one Relief Harris, a married woman, of a certain promissory note of hand, and it was held that if the note was the property of the husband, and not of the wife, the variance would be fatal.

But the case more directly in point is that of *Commonwealth v. Harley*, 7 Met. 506, which seems to embrace the present question. The allegation there was of a conspiracy to cheat and defraud a particular individual named; and it was contended that a general intent to defraud, if it operated, when carried into effect, to defraud a particular individual, might well authorize the charge of a conspiracy to defraud such person, though that individual was not in the contemplation of the parties at the time of entering into the conspiracy, and it did not appear that the defendants had agreed to perpetrate the fraud on him particularly. But it was held, that proof

that the defendant conspired to defraud the public generally, or any individual whom they might meet and be able to defraud, would not sustain the indictment charging, as it did, a conspiracy to defraud the individual who was named in the indictment.

Although it is generally true, that the party is to be held to have intended the legitimate effect of his acts, and, in ordinary cases of indictments for crimes, it would be quite sufficient to allege and prove the acts to have been committed against the person or property of the individual actually injured thereby, yet this principle does not fully apply to cases like the present. In an indictment for a conspiracy, the criminal offence is the act of conspiring together to do some criminal act, or to effect some object, not in itself criminal, by criminal means. The offence may be committed before the commission of any overt acts. The gist of the offence being the conspiracy preceding all such overt acts, the purpose of the conspiracy should be truly stated. If it was a general purpose to defraud, and not aimed at any particular individual; if the person, who, upon the commission of the overt acts, would be defrauded, was unknown; then it would be improper to apply to the original conspiracy the purpose to defraud the party who was eventually defrauded, but not within any previous purpose or design of the conspirators, or in reference to whom the conspiracy itself had any application.

The case of *Commonwealth v. Harley* seems decisive of the present case. To apply the principle here, it becomes necessary to look at the case as stated in the bill of exceptions. The conspiracy charged, is an agreement to cheat and defraud the Howard Fire Insurance Company of their money. The evidence tended to prove that the overt acts were commenced as early as the 5th of January, and that on the night of that day certain goods were removed from the store of Kellogg, and that a fire occurred on the 7th of January, destroying the store in which said goods had been previous to the 5th of January, and the evidence tended to show, that the defendants had no knowledge of any insurance upon the goods by the Howard Insurance Company, until after the fire, and of course

after the removal and secreting of the goods. How, then, can it be said, that the defendants, on the 5th of January, conspired to cheat and defraud the Howard Insurance Company; or that, in the removal of the goods on the 5th of January, they had any such concerted purpose? The removal of the goods, and the secreting of them, were acts done by the defendants before they had any knowledge of the existence of the policy of insurance made by the Howard Insurance Company. All these acts, prior to and including the 7th of January, cannot have been the result of a conspiracy to defraud the Howard Fire Insurance Company. It was only after the existence of the policy of insurance, issued by that company, became known to the defendants, that they could have had the particular purpose to defraud that company.

A charge of conspiracy, in the form of this indictment, that is, alleging the original purpose to have been to defraud the Howard Fire Insurance Company, cannot be supported by proving a conspiracy with a general intent to defraud, and then proving the further fact, that after the acts of removing the goods and concealing the same, and after a fire had destroyed the store, the defendant Kellogg, upon hearing that there was an insurance by the Howard Fire Insurance Company, falsely represented that the goods had been destroyed by fire. *Verdict set aside, and new trial ordered.*

SCHOOL DISTRICT NO. 6 IN BELCHERTOWN vs. JESSE RANDALL.

The prudential committee man of a school district, chosen by the district, pursuant to a vote of the town, is not liable to the district for money, received by him out of the treasury of the town, which had been raised by the town, and appropriated by it to the support of the school in such district, and placed to the credit of the district upon the town treasurer's books.

THIS was an action of assumpsit, commenced before a justice of the peace, and submitted to the court of common

School District in Belchertown v. Randall.

pleas, and, upon appeal, to this court, upon the following statement of facts :

The defendant was chosen in 1846, by the School District No. 6, in Belchertown, the prudential school committee for the district, agreeably to a vote of the town. The town has never by vote authorized the prudential committee to control and pay the teachers, unless referring the choice of prudential committees to the school districts confers that power. The town at their annual meeting raised money for the support of the schools, and appropriated it among the several school districts, as was their custom, and the amount so appropriated to the several districts was passed to the credit of each district upon the town treasurer's books. At the time defendant was acting as prudential committee, the town had passed to the credit of District No. 6, sixty nine dollars. This sum was drawn from the town treasury by the defendant, upon an order of the selectmen founded upon the certificate of the defendant, which was the usual manner of drawing money from the town treasury for school purposes. The defendant paid, out of the sixty nine dollars, fifty one dollars to the teacher of the school, being all that was due the teacher for his services, and appropriated a further sum to pay charges for which the district was liable ; and the balance of the sixty nine dollars, remaining in the defendant's hands, the plaintiffs seek to recover in this suit. If, upon the foregoing facts, the plaintiffs can maintain this action, judgment is to be rendered for them ; otherwise, for the defendant.

M. Lawrence, for the plaintiffs.

C. Delano, for the defendant, cited *Rev. Sts. c. 23, §§ 1, 9 & seq. 25, 26, 28, 57, 58 ; Fourth School District in Rumford v. Wood*, 13 Mass. 193, 199 ; *Clark v. Great Barrington*, 11 Pick. 260 ; *School District in Sanford v. Brooks*, 10 Shepl. 543.

FLETCHER, J. The question is, whether the plaintiff can maintain this action to recover the money redeived by the defendant out of the town treasury.

To maintain this action in the name of the district, it is assumed on the part of the plaintiff, that when the sum of sixty nine dollars was credited to the district on the books of

the treasurer of the town, it became the property of the district; that the town had no further control of it, but it remained subject to the order of the district. But this proposition can find no support in the law. Our whole school system is framed upon an entirely different principle. Putting the money to the credit of the district by the treasurer of the town in his books was only a mode of keeping his accounts, to show how the money of the town was appropriated. Placing the money thus to the credit of the district gave the district no right to the money as against the town, nor did it in the least impair the right of the town to control the money, nor did it release the town from its obligation to see that the money was properly applied to the support of the schools. It in fact only showed the amount appropriated by the town to support a school for the benefit of the district.

The law imposes upon towns, and not upon districts, the obligation of maintaining schools. The money for this purpose must be raised by the town, and belongs to the town; and the town must see that it is properly applied to this purpose. It is no part of the duty of the prudential committee man to pay the teachers. He is not by his office the agent of either the district or the town for this purpose. The town may, if it thinks proper, determine that he may contract with the teachers; but the town must see to it that payment is made according to the contract. Furnishing the committee man with money to make payment, will not discharge the town from liability, if payment be not in fact made. In the present case, if the defendant had squandered the money, and had not paid the teacher, the teacher could have enforced his claim for wages against the town. The town, and the town only, is liable to the teachers for their wages, and they may constitute the prudential committee man, or any body else, their agent to make payment; and whoever is intrusted with the money of the town for this purpose, is, of course, responsible to the town, and not to the district.

The money was not put into the hands of the prudential committee man to be by him paid to the district, but to be by him applied to the use of the town, in paying the debts of the

town. If the money had been misapplied, or lost in any way, it would have been the loss of the town and not of the district, because it is the town, and not the district, which is bound to pay the teachers and maintain the school.

The error, which lies at the foundation of the plaintiff's case, is the assumption that the money credited to the district became the money of the district. Whereas, by this credit, the town only manifested the amount to be expended by the town to support a school for the benefit of the district. The prudential committee, when particularly authorized by the town, may contract with the teachers, and when he is not so authorized, the general school committee must make the contracts. The wages, thus contracted for, must be paid by the town, and not by the district, and the town is bound by law to raise the money for this purpose.

The district has power to raise money for certain specified purposes, but the money in question in this suit is money raised by the town and not by the district. The prudential committee was not in this case authorized to contract with the teachers; it was therefore the duty of the general school committee to provide a teacher to continue the school, so long as there was money raised by the town to pay the wages; and the money raised by the town should be applied to maintain the school, and not to pay expenses for which the district was exclusively liable.

The money in question in this case was raised by the town, and belonged exclusively to the town, and was in no sense the money of the district, and there is no ground on which this action can be maintained by the plaintiff. And judgment, therefore, on the facts, must be entered for the defendant.

HENRY S. BELCHER vs. NORMAN A. SMITH.

The payee of a note, who signs his name to these words written on the back thereof, "I hereby guaranty the within note," is not liable thereon as indorser.

THIS was an action of assumpsit on a promissory note, bearing date of January 16, 1850, and payable to the defendant or his order, on demand.

At the trial in the court of common pleas, before *Hoar*, J., the following facts appeared: The defendant on the 3d of February, 1850, transferred this note to Field & Leland, in payment of a debt, and wrote his name on the back of the note, with these words over it: "I hereby guaranty the within note." Field & Leland subsequently transferred the note to the plaintiff, and indorsed upon it, over their signature, these words: "For value received pay to Henry S. Belcher at his own risk." The defendant objected that the plaintiff could not maintain an action in his own name, on the defendant's indorsement; that it showed a contract of guaranty with Field & Leland, and was not negotiable. But the court ruled that although the contract of guaranty was not negotiable, the effect of the transfer of the note from the defendant to Field & Leland with the indorsement upon it, was such as would have authorized Field & Leland, and would authorize the plaintiff to write over the indorsement the words "pay to Field & Leland or their order;" and the plaintiff was permitted by the court against the objection of the defendant, to write those words.

The plaintiff having obtained a verdict, the defendant excepted to the above ruling.

C. P. Huntington, for the defendant.

E. Clark, for the plaintiff.

DEWEY, J. The question raised in the present case, of the right of the plaintiff to maintain an action as indorsee of the promissory note sued upon, was fully considered by us and settled in the recent case of *Tuttle v. Bartholomew*, 12 Met. 452. Upon a review of the question, and comparison of the conflicting decisions and grounds upon which they were

Eldridge v. Benson & Trustees.

placed, the court were of opinion that where the name of the payee of the note was indorsed on the back of the note in no other form than as a signature to a guaranty fully written out and expressed, leaving nothing for implication, this was not such an indorsement as authorized a subsequent holder of the note to sue upon it as indorsee. It is true there was the further objection in that case, that the guaranty was signed not only by the payee of the note, but also by another person, and in the form of a joint guaranty. But irrespective of that, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name, as indorsee.

New trial ordered.

SHALER W. ELDRIDGE vs. GEORGE W. BENSON & Trustees.

S. agreed with B. to furnish such good and responsible persons, as B. should designate to act as agents for the sale of certain books, with the said books, at a certain price, supplying their orders, and receiving their remittances, and placing all money so received, above the amount of the price agreed upon, to the credit of B., and, at the close of the labors of such agents, to receive all the books returned by them uninjured, and credit the same, at the cost price, to B.; and B., on his part, guarantied to S. the security and full payment of the stipulated price for all books so furnished. It was held, that the contract between S. and B. was that of principal and agent, and not that of vendor and purchaser, and that books, furnished under this contract to the agents designated by B., did not become B.'s property.

THE several trustees in this case having made answers, whereby it appeared that they had in their possession several sets of books known as "Sears's Pictorial Works," Robert Sears, of New York, upon application to the court, was admitted as a party to the cause, and claimed the said books as his own property. The only question submitted to the jury at the trial, which was in the court of common pleas, before Hoar, J., was whether, at the time of the service of the writ on the trustees, these books were the property of Sears, or of the plaintiff. Sears contended that the books in question

were delivered to the trustees, as agents accountable and responsible to him, and that they received the same to sell, and make remittances to him; and in support of this claim, he offered in evidence a contract in writing between himself and Benson, under which the books were delivered, of which the following is a copy:

"The following agreement between Robert Sears, of the city of New York, on the one part, and George W. Benson, of Northampton, Mass., of the other part, witnesseth: That the said Robert Sears, the party of the first part, agrees to furnish such good and responsible persons, as the said George W. Benson, the party of the second part, may designate or elect to act as agents for the sale of Sears's Pictorial School Library, with said works at \$13.50 per set of twelve volumes, to said Benson, supplying their orders and receiving their remittances, and placing all money so received above the amount of \$13.50 as above specified, to the credit of said Benson, and at the close of the labors of the said agents, to receive all the books returned by them uninjured, and credit the same to said Benson, at the cost price above specified; and the said George W. Benson, the party of the second part, hereby guaranteed to said Robert Sears, the security and full payment of the above named price of \$13.50 per set of twelve volumes of the aforesaid work as may be delivered to all such persons as he, Benson, may appoint as agents, and to whom he may direct said books to be sent. It is further agreed between said parties, that settlements shall be made quarterly for all bills contracted by said Benson on his account."

The plaintiff contended that the books delivered under this contract became the property of Benson, and the construction of the contract was the only question submitted to the court. The judge ruled, that under this contract, the books still remained the property of Sears; and under this ruling, the jury found a verdict for him; whereupon the plaintiff excepted.

C. Delano, for the plaintiff.

C. P. Huntington, for Sears.

BIGELOW, J. This cause was tried in the court of common pleas, upon an issue framed under Rev. Sts. c. 109, §§ 16, 17, 18, between the plaintiff and one Robert Sears, who claimed the property in the hands of the supposed trustees, as belonging to him. The right of the claimant to the property depends entirely upon the true construction of a written contract between him and the defendant, and it is the construction put upon this contract by the court below, to which exceptions have been taken, upon which we are now to pass.

The contract is inartificially and obscurely drawn, and it is

somewhat difficult to ascertain the precise purport of all its stipulations; but, upon a careful consideration of its several provisions, we are of the opinion that it created between the parties the relation of principal and agent, and not that of vendor and vendee. The leading feature of the agreement, which of itself would be quite sufficient to determine its meaning, is the right reserved to the defendant to return such portion of the books, delivered to him under the contract, as might not be disposed of by the agents. Such a stipulation is wholly inconsistent with an absolute sale of the property to the defendant, and clearly indicates the intent of the parties to have been, that the right of property should remain in the claimant. The elementary definition of a sale is the transmutation of property from one man to another; but no such change takes place, when it is agreed between parties that property may be returned to the person from whom it was received. To test and illustrate the correctness of this principle, as applicable to the case at bar, let us suppose all the agents to have been unsuccessful in disposing of the books, and, at the close of their efforts to sell the work, to have had on their hands all which they originally received from the claimant. By the terms of the contract, the defendant would have the right to return to the claimant all of the books which had been received. By construing this contract therefore as a contract of sale, by which the property became vested in the defendant, we should be led to the necessary but absurd conclusion, that a vendee to whom the absolute right of property had passed could still retain the right of returning it to his vendor.

But there is another consideration of equal force, arising out of the provisions of this contract, which is quite decisive of the intent of the parties, and of its true construction. The contract provides that the defendant should select certain persons as agents for the sale of the books named in the agreement. But these agents were to have the right to order the books, and receive them directly from the claimant, and were to remit the proceeds of their sales to him, without the intervention of the defendant. Now, if the right of property vested

in the defendant, upon the delivery to the agents, his creditors could attach the books in the hands of the agents, and take them from their possession, by the ordinary process of law; the effect of which would be, to defeat the most important stipulations in the agreement. The agents could then no longer remit the proceeds of their sales to the claimant, nor account to him for the books which they had received on their own orders; nor could the defendant or the agents return any part of the property to the claimant, in conformity with that part of the agreement. We think, therefore, the real intent of the parties was, that Benson was to select persons to act as agents for the sale of the books; that these persons were to be agents for the claimant, to whom he was to send books for sale on their own orders, for which they, and they only, were to account to him; that the defendant was to guaranty their fidelity and solvency; and to receive from the claimant, as a fund out of which to compensate himself and the agents, all that was received in remittances from sales, over and above the stipulated price. This very fact, that Benson was to guaranty "the security and full payment" by the agents to the claimant, is significant to show, that the books were not sold to the defendant; but were delivered to the persons selected by him, as agents of the claimant, and who were to be accountable to him. A guaranty by the defendant to the claimant implies a liability on the part of the agents to the claimant, because there can be no guaranty, unless there is a promise or agreement to which it may be applied. If the books were sold to the defendant absolutely, the agents would be liable only to him, and not to the claimant.

It was urged, by the counsel for the plaintiff, that the provision in the contract, which stipulates that the books returned should be credited to the defendant, indicates that it was the intention to charge the books as absolutely sold to him. But it seems to us more reasonable and consistent with the other parts of the agreement to hold that the account to be kept with the defendant was only intended to show the extent of his liability under the guaranty, for the agents. As he was to be responsible for them, it would be necessary to

charge him with the books delivered to the agents, and credit him with those returned, in order to ascertain the extent of his liability as guarantor. * But it is to be observed, in this connection, that the contract does not provide that the entire proceeds of sales by the agents were to be credited to Benson, as it should have done, if the books were charged to him as sold; but it is expressly stipulated, that he is to be credited only with the amount remitted by the agents, over and above the price at which they were to be furnished to the agents; clearly showing, that he was not charged with the price of the books, and did not therefore become the owner. The agreement for quarterly settlements does not affect the view which we take of this contract. To arrive at its true construction, all its parts must be construed together. The right to return the books was limited only by the expiration of the term of service of the agents, and not by the time limited for the settlements, which were only to include the books which had been sold or returned, at the time each settlement should take place.

From these views, it seems to us very clear that the contract in question was not a contract of sale, but one of agency only; that no title to the books vested in the defendant; that the books in the hands of the agents, and attached by the trustee process, are still the property of the claimant; and that the trustees must be discharged. See *Meldrum v. Snow*, 9 Pick. 441.



SAMUEL A. BOTTOM & others vs. AUGUSTUS CLARKE & Trustees.

Where a small locked trunk is deposited in the vault of a bank, for safe keeping merely, with the consent of the officers of the bank, who are ignorant of its contents, and have no authority to open the trunk for the purpose of ascertaining them; neither the bank, nor its officers, can be charged by the trustee process as the trustees of the owner, either for the contents of the trunk, or for the trunk itself.

THE parties, summoned as trustees of the principal defendant in this case, were the president, directors and company of

the Holyoke Bank, and John Clarke, their president. The case was submitted to the court upon the answers of the said Clarke, which, it was agreed, should be taken also as the answers of the bank. He answered as follows :

“ At the time of the service of the writ, there was in the vault of the Holyoke Bank, a small trunk, which had been left in the vault by Augustus Clarke; neither I nor any other officer of the bank have known its contents, or had access to said contents. He merely requested the privilege of leaving it in the vault, whenever he has brought it there; and this privilege I have sometimes given, when I was present at the time; or, if I was not there, the cashier, or the clerk would give it. Neither the bank nor I personally took any responsibility of safely keeping said trunk; and the said Augustus Clarke usually himself put it in the vault and took it from thence. Said trunk was kept locked up with other property in the vault, whenever it was there at the usual time of locking the vault. I can't recollect how long he had been in the practice of leaving the trunk there; he had done so for some time prior to the service of the writ. No person has access to the vault without permission of some one of the officers of the bank. And, as I have stated, Augustus Clarke acted, as I have no doubt, under a permission from myself, or the cashier or clerk in the bank, present at this particular time of leaving it. But I have no knowledge or recollection as to who was present or gave the permission at this particular time. I might have given it, the cashier might, or the clerk might; whenever such permission was given, it was given by either of us, rather as a neighbor, and as granting a neighborly favor, than as an officer of the bank, having any authority in behalf of the bank to grant such permission. This deposit did not differ from many, perhaps most, of the other deposits of trunks or valuables. We have often given a permission, such as was given to Augustus Clarke. I have not at any time known from said Clarke, or otherwise, any of the contents of said trunk, or of what the contents consisted.”

C. P. Huntington, for the plaintiffs, cited *Foster v. Essex Bank*, 17 Mass. 479, 498; Story on Bailm. §§ 55, 60, 88, 89, 97.

C. Delano, for the trustees.

METCALF, J. The Holyoke Bank and its president, John Clarke, are summoned as trustees of the principal defendant. By agreement of the parties, the answer of the president is taken, as well for the bank as for himself. On this answer, the question has been raised, whether the trunk, if intrusted or deposited in the hands or possession of any one, was so intrusted or deposited in the hands or possession of the bank or of the president. But we need not decide this question; because we are of opinion that, though it should be decided in the affirmative, yet that both the bank and the president must be discharged, upon another ground.

The trunk, in this case, was put into the vault of the bank, as a place of safe keeping merely. Its contents were unknown, and are still unknown, to the officers of the bank; and they had no right to open it, either before or after service of the trustee process, for the purpose of ascertaining its contents. Such an act would have been a breach of trust, which would have subjected them to an action by the depositor. *Foster v. Essex Bank*, 17 Mass. 504, 506. Now as the answer of the bank and its president furnishes no evidence of the contents of the trunk, we are not authorized to presume that it contained goods, effects or credits, which could be attached and held to satisfy a judgment against the owner. Judging from our extrajudicial knowledge concerning such deposits in banks, we should rather presume that the trunk contained notes and securities, or other valuable private papers, that are not within the reach of the trustee process. But we make no presumption whatever. The parties summoned as trustees in this case must be charged or discharged, on the answer which has been filed, and on that alone. That answer does not show that the trunk contained any attachable goods, effects or credits of the principal defendant.

It was suggested, in behalf of the plaintiffs, that the bank, or its president, must be charged as trustee, at least for the trunk, if not for its contents, and is bound, by the Rev. Sts. c. 109, § 22, to deliver it to the officer who may hold an execution against the owner, to be sold as if taken on execution

in the common form. But, by that section, it is only when the party, who is summoned as trustee, is "chargeable" as such, by reason of "goods or chattels, other than money," held by him, that he is required to deliver the same to such officer. And we have already seen that the parties summoned as trustees in this case are not chargeable for the unknown contents of the trunk, and cannot lawfully open it and take its contents from it. If, therefore, they were to be charged, by reason of the trunk, and were bound to deliver it to an officer, to be sold on execution, they must also deliver to him the contents, for which they are not chargeable, including even money, (if it contains money,) which they are not by law bound so to deliver. As the trunk and its contents cannot lawfully be separated by the officers of the bank, and as they are not chargeable by reason of the contents, and cannot lawfully deliver the one, without delivering the other, they are not chargeable by reason of either.

By the custom of London, locked trunks and boxes are subject to foreign attachment, and the court, after four several defaults of the owner, gives judgment that they be opened. Priv. Lond. (3d. ed.) 266; Com. Dig. Attachment, C. We have no such law or custom. It may be, however, that an officer, in the service of an execution, is authorized to break open the judgment debtor's private trunk, (2 Show. 87,) for the purpose of selling the contents, if they are liable to execution. But he must first obtain lawful possession of the trunk. And we cannot help him to such possession in the present case.

Trustees discharged.

BENJAMIN SAWYER *vs.* THE INHABITANTS OF NORTHFIELD.

The statute of 1850, c. 5, providing that "if any person has heretofore received or suffered, or shall hereafter receive or suffer, any bodily injury," &c. through any defect or want of repair in a highway or bridge, "he may recover in a special action of the case of the county, town or persons, who are by law obliged to repair the same, the amount of damages sustained thereby," if they had reasonable

Sawyer v. Inhabitants of Northfield.

notice, or if the defect had existed twenty four hours; and repealing Rev. Sts. c. 25, § 22, saving actions, in which verdicts had been rendered when the statute of 1850 took effect; did not prevent the recovery of single damages against a town for an injury occasioned by such a defect or want of repair, in an action upon Rev. Sts. c. 25, § 22, which had been commenced, but in which no verdict had been rendered, when the statute of 1850 took effect.

A town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair.

SHAW, C. J. This cause came up last year, and was argued upon a preliminary question, of considerable difficulty, which arose in this and several other cases on that circuit. It is an action on the case against the town of Northfield, upon Rev. Sts. c. 25, § 22, to recover damages for an alleged defect in a highway which the town was bound to repair. This action was commenced on the 8th of February, 1850. The case came up on a bill of exceptions, by which it appeared that a motion was made in the court of common pleas to dismiss the action, on the ground that an act had been passed, (*St.* 1850, c. 5,) by which Rev. Sts. c. 25, § 22, had been repealed, without any saving clause, except in favor of pending actions, in which a verdict had been rendered; and, of course, that there was no law now in force, by which this action could be prosecuted, and judgment given. After the passage of the act of 1850, the plaintiff was allowed by the court of common pleas to amend his declaration, by withdrawing his claim for double damages.

The question arises upon the construction and effect of *St.* 1850, c. 5. This act was passed on the 2d of February, 1850, a few days before this action was commenced; but no special provision being inserted, in regard to the time of its taking effect, it stood upon the general law making it take effect in thirty days from its passage, namely, on the 7th of March, 1850.

The form and structure of this statute are somewhat peculiar. The first section provides, that "if any person has heretofore received or suffered, or shall hereafter receive or suffer, any bodily injury, or any damage in his property," &c., and so proceeds almost in the terms of Rev. Sts. c. 25, § 22. It sub-

stitutes the term "bodily injury," instead of "injury in his person," in conformity with the recent decision in the case of *Harwood v. Lowell*, 4 Cush. 310. The immediate occasion of the statute probably was the recent decision in the case of *Brady v. Lowell*, 3 Cush. 121, in which it was held, that no action would lie against a town, either for single or double damages, unless the defect had existed twenty four hours, at the time of the accident. It proceeds to enact, that a person so suffering may recover in a special action of the case, of the county, town or persons who are by law obliged to repair the same, the amount of damage sustained thereby, if such county, town or persons, had reasonable notice, or if the same had existed twenty four hours. With some changes of phraseology it substantially reenacts the old law with two important alterations; one was, substituting actual reasonable notice or twenty four hours existence of the defect, instead of making twenty four hours existence an absolute condition; thereby altering the old law as expounded in *Brady v. Lowell*; the other giving an action for the actual damage, instead of double those damages, in the nature of a penalty. The latter was an amendment which had often been mentioned and was much desired.

The second section of this statute is as follows: "The twenty second section of the twenty fifth chapter of the revised statutes, is hereby repealed; provided, that this act shall not affect any action for the recovery of *such* damages, in which a verdict may or shall have been rendered, before this act shall take effect." From this peculiar phraseology, it would seem probable, that there had been some intermediate provision as the statute was first drawn, limiting the repeal of the old law so as to confine it to that part of the statute which gave an action for double damages, in which case the exception of actions for the recovery of *such* damages, that is, double damages, would have been significant and intelligible, and conformable to what appears to have been the purpose of the act. As it is, the term "for the recovery of *such* damages" is without meaning, because the repeal is general, and applies to all actions, in which a verdict may not have been recovered, for any

damages, single or double. But we must take the act as we find it, and construe it according to its terms; applying, however, the common rule of construction, that every provision, clause and word, is to be taken into consideration, in putting a construction upon the whole.

The argument of the defendants is, that the old law was wholly repealed, and a new law was made, giving a more limited right of action; and then their argument is, that, at all events, this action cannot be maintained; not on the old law, because it has been repealed, and no judgment can be rendered unless the law is in force, at the time of such rendition, to warrant it; and not on the new law, because it had not gone into operation, when this action was commenced. Had the original act been repealed in terms, by a distinct substantive act, and another act had been subsequently passed giving the qualified remedy provided for in the statute in question, the defendants' argument would have been extremely plausible, perhaps unanswerable. In such a case, it would be very clearly the intention of the legislature wholly to annul and abrogate the existing law; and then the new and qualified right and remedy given by the succeeding act would be a new creation, and begin and take its effect from the passing of such new law. But the first obvious consideration affecting the act in question is, that the repeal of the existing law, and the provision for a qualified remedy and right of action for the same damage, operate *eo instanti*—take effect at the same moment. So that there was no interval of time, when a right of action against a town for single damages, and a remedy for that right, did not exist. Whatever name therefore may be given to this measure, or in whatever form it may be put, it is essentially a modification of the preëxisting law, retaining a part and abrogating a part. There never has been a moment, from the time the accident occurred, of which the plaintiff complains, to the present time, when there was not a law in force, giving him a remedy against the town, for single damages. We are endeavoring to ascertain, from the statute itself, what the legislature intended by their enactments.

There is another view, tending to show that the legislature

did not intend to annul and extinguish the old law, and provide a new one, commencing and taking effect, as it must, from the time of its enactment. It is well established by many decisions, that in this commonwealth there is no remedy by the common law, for a sufferer by a defect in a highway, against a town. *Mower v. Leicester*, 9 Mass. 247. The remedy is wholly by statute law; begins with it, is regulated and limited by it, and ends with it. Now if the legislature were making a new law in 1850, charging towns with liabilities for accidents from defects in their highways, it would not be within the just province of legislative authority, to declare, that they should be liable for accidents, which had occurred at anterior periods, when no law was in existence rendering them liable. And if the preëxisting law was absolutely annulled, it was the same as if it had never existed.

It is to be presumed that the legislature well understood this just limitation upon their authority. It is not to be presumed that they intended to exercise an act of power not within the scope of their legitimate authority, by making a party responsible for past casualties, who was not responsible for them, when they occurred; especially, when the same purpose could be accomplished, by the modification and melioration of the existing law, in a mode entirely free from objection. And when the whole act taken together will admit of a construction, which assumes that the legislature have not only acted within the scope of their authority, but exercised a beneficial and useful power, we are to adopt it, rather than put a construction upon it, though more literal, which goes on the assumption, that they have exceeded their authority, or even exercised a doubtful power.

The act, of which we are endeavoring to ascertain the true construction, provides that "if any person has heretofore received or suffered, or shall hereafter receive and suffer any bodily injury," &c. Now treating this as a new law, charging a heavy burden upon towns, for past acts, in cases where there was no law making them liable at the time, it would be a harsh and doubtful exercise of power, if not unconstitutional and void. But treating the whole act as a modification of the pre-

existing law, the new provision gives a cause of action and a remedy; only where there was one before, that is, in the same cases of defect of highways, for actual damages sustained; and it merely takes away, both from past and future cases, the harsher claim, in the nature of a penalty, for double damages. We think, therefore, that we are not bound to construe the repealing clause in the second section, as an absolute repeal; when, taking the whole statute together, it is manifest that the legislature intended a limited repeal only; repealing that part of the statute which gave double damages, and retaining and continuing in force, in the form of a reenactment, that part of the old law which was strictly remedial. This doctrine receives a powerful illustration, by the history of the revised statutes. All the preëxisting general statutes of the commonwealth were repealed, in terms; but new laws, preserving all existing rights and remedies, were made, to take effect *eo instanti* with such repeal. But for the saving efficacy of the principle on which we construe this act, all pending actions would have been abated, and all existing rights of action, depending on statute, taken away.

It seemed to be assumed in the argument, that this action must abate and be dismissed, although the plaintiff under the provision in the first section might bring a new action. Perhaps, if the statute of 1850 could be construed as giving a new and valid right of action and a new remedy, founded upon and commencing with it, a new action must have been commenced. But if we are right in our construction, saving the right of action, it preserves the action itself. This action was rightly brought, and rightly prosecuted up to the moment when this act went into operation. The words of the statute are, "if any person has heretofore suffered," "he may recover in a special action of the case;" not that he may commence an action, or bring an action. When the statute went into operation, and the right and the remedy were both preserved and continued, we think the decision of the judge, allowing the plaintiff to amend his declaration by withdrawing the claim for double damages, and declining to dismiss the action, was correct. [See St. 1851, c. 32.]

2. We are then brought to a consideration of the other point in the case. The defect, in respect to which the plaintiff seeks to recover damages of the town, was of a bridge in the town of Northfield, erected on a public highway over and across a deep cut, made by the Connecticut River Railroad Company for the use of their road. It appeared that the bridge in question was made by the said railroad company, by order of the county commissioners, and that it had continued ever since unaltered. By reference to the order of the county commissioners, being part of a general order, we find it to be as follows: "The road near Sawyer's Mills to cross over said railroad. Said company to build and forever maintain a good bridge, thirteen feet wide, at the present grade of said road." The defendants objected, that upon this evidence no action could be maintained against the town; but the court overruled the objection. This question is now renewed before this court. The defendants contend that they are not responsible for any defect or want of repair in the bridge in question, because it is one which the proprietors of the railroad were required by law to build and did build, and one which they are in like manner bound to maintain and keep in repair. The provision of law, under which towns are chargeable, if at all, and on which the plaintiff relies, and did rely when he brought his action, is Rev. Sts. c. 25, § 22. By this provision, the party suffering damage, by any defect or want of repair, may recover of the county, town or person respectively, that is by law obliged to repair the same. The right of action is given against a town, if the town is obliged, and only in case the town is obliged by law, to repair the same. To ascertain this, we are to look at other provisions of law. By § 1 of the same chapter, it is provided that all highways, town ways, causeways and bridges, within the bounds of any town, shall be kept in repair at the expense of such town, where other sufficient provision is not made therefor. This creates a qualified, and not a general liability. If there be a turnpike or bridge corporation, bound either by a general law, or by the terms of its charter, to maintain and repair a highway or bridge, then, by the terms of the statute, towns are not liable. It is not to

be regarded as a special exemption from the performance of a duty ; it forms a case where the liability of towns does not attach.

Then the question is, whether the liability of the railroad corporation to keep this bridge and its abutments in repair, is such sufficient provision therefor, as to prevent any liability for its defect from attaching to the town. When railroads came to be established in this commonwealth, it was at once perceived that they must of necessity cross other public ways ; and as of necessity the railway must be kept on a level, or nearly so, intersecting roads must often be raised or lowered, and bridges erected, in order to adapt these roads to the grade of the railroad. But as these structures were to be raised, and abutments made, solely for the benefit of the railroad, it was strictly equitable, that the cost, both of making and maintaining them, should be charged on the proprietors of the road, as part of the expense of making and maintaining the general structure. Some provisions were made with a view to this object, in the earlier acts of incorporation ; but it is not necessary to examine the provisions prior to the revised statutes, which contained regulations intended to form a general system, and which were passed long before the Connecticut River Railroad Company was incorporated. By Rev. Sts. c. 39, § 72, it is provided that every railroad corporation shall maintain and keep in repair all bridges, with their abutments, which such corporation shall conduct over or under any turnpike road, canal, highway or other way. This law expressly declares the duty of the railroad company to maintain and keep such bridges in repair. It applies to just such a bridge as the one of the defect in which the plaintiff complains. This duty was clearly recognized in the case of *Cambridge & Somerville v. Charlestown Branch Railroad*, 7 Met. 72. That this duty devolves directly upon the railroad company and not upon the town in the first instance, is substantially decided in *Parker v. Boston & Maine Railroad*, 3 Cush. 119. But if there could exist any doubt upon the provision of the revised statutes above referred to, the duty is more distinctly and emphatically declared by St. 1846, c. 271, § 1, to the pro-

visions of which the Connecticut River Railroad Company were made subject. It provides that "every railroad corporation, which may hereafter construct a railroad across any turnpike, highway or town way shall construct it so as to cross over or under such turnpike, highway, or town way." "And such railroad corporation shall build, keep up and maintain in good repair, such bridges, with suitable and convenient approaches thereto," &c. The order of the county commissioners, laying out this road, was therefore well warranted; for though that order did not create, it did justly and legally declare, the duty of the Connecticut River Railroad Company, not only to build, but forever to maintain the bridge in question. It was a provision adequate to its purpose, and permanent in its nature.

The court are therefore of opinion, that there was sufficient provision made by law for the expense of keeping said bridge in repair; that the town were not bound to repair the same, and therefore were not liable to the plaintiff for any damage sustained by him, by reason of any defect or want of repair thereof.

Verdict set aside.

G. T. Davis, for the defendants.

D. Aiken and G. Grennell, for the plaintiff.

ERASTUS SMITH vs. THE INHABITANTS OF WENDELL.

A town is not liable for an injury occasioned to a traveller, passing from a public highway to a railroad station through a road opened by the proprietors of the railroad for that purpose, by a block of stone, lying within the limits of the highway, as located, and obstructing the entrance to the road to the station, if it does not obstruct the road-bed of the highway.

THIS was an action on the case to recover damages for an injury to the plaintiff, by reason of a defect in a highway in the town of Wendell. The highway described in the declaration was one running from the town of Northfield, southerly, across Miller's River and the Vermont and Massachusetts Rail-

road to the village of Wendell; and was alleged to have been defective by reason of a large stone lying in the road, between the bridge over Miller's River, and said railroad crossing. At the trial, which was in the court of common pleas, before *Bishop, J.*, it appeared in evidence, that the Wendell station of the Vermont and Massachusetts Railroad Company was a few rods east of the railroad crossing, and on the north side of the railroad track; that a road opened by the railroad corporation ran from the station, west, to the highway joining the same, very near the point where the highway crossed the railroad track; that a week or ten days before the injury complained of, the cars of the Vermont and Massachusetts Railroad Company commenced running to the Wendell station; that, on the day of the accident, the plaintiff arrived at the station in the cars, and then took the stage coach for Brattleborough; that the coach left the station by the road running from the station to the highway described in the declaration; that, in turning into the highway, the coach struck a large granite block, lying at or near the point of junction of the two roads, was upset, and the plaintiff was seriously injured.

The principal question put to the jury was in relation to the position of this granite block. There was evidence tending to show that it lay a little north of the point of junction of the two roads, with one end upon the east bank of the highway, and the other end projecting into the highway, and covering the wheel ruts. There was also evidence tending to show that it lay a little east of the point of junction of the two roads, wholly within the limits of the public highway described in the declaration, and within the portion of it used for travel to and from the station, but not within the portion of it appropriated to the north and south travel.

The plaintiff requested the court to instruct the jury, "that, if the injury was occasioned by a defect within the limits of the highway, and upon a part appropriated to public travel, to and from the station of the Vermont and Massachusetts Railroad Company, by means of a road made by the company, and dedicated to public use, leading from the station to

the point of intersection with the highway, the town was liable." There was no evidence of the dedication of the road to public use, except that it was a passage opened and used for the purpose of passing from the highway to the station, as before stated; and the judge declined to give the instruction requested; but instructed the jury, "that if the stone alleged to have caused the accident was not a defect or want of repair in the highway, and was an obstacle and unsafe to those only passing from the private way into the highway, the private way not being so made as to admit of safe and convenient turn and entrance upon the highway, and if, in consequence of the private way being so made, the coach was upset by the stone, the defendants were not liable; if, however, the stone made the highway unsafe, and caused the injury alleged, the driver exercising ordinary care and prudence, the defendants were liable." The judge also ruled, that the defendants were bound to have the highway safe and convenient, and of sufficient width for travellers thereon.

The jury retired, and after being out some time returned into court, and through their foreman asked the judge whether, if the stone lay within the limits of the highway, as located, obstructing the entrance of the road to the station, but not obstructing the road-bed worked for north and south travel, the town was liable. To which the judge replied that, in that case, the town was not liable.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

G. Ashmun and *D. W. Alvord*, for the plaintiff.

C. P. Huntington and *D. Aiken*, for the defendants.

DEWEY, J. It has become well settled law, that towns are not necessarily chargeable with damage arising from every obstruction within the limits of a located highway. They are not liable for such obstructions in portions of the highway not a part of the travelled path, and not so connected with it that they will affect the security or convenience for travel of those using the travelled path.

Hence, in a late case, *Shepardson v. Colerain*, 13 Met. 55, it was held, where the injury was sustained by a party using

the public road for the purpose of entering upon his private way, although it was occasioned by an obstruction within the limits of the located highway, but without the road for public travel, that the town was not liable.

The present case presents a question very similar in principle. The court instructed the jury, that if the alleged obstruction rendered the public highway unsafe, and thereby caused the injury complained of, the defendants were liable. The jury were also instructed, that the defendants were bound to have the highway of sufficient width for travelling. But the plaintiff insists that, if any obstruction within the limits of the located highway occasioned an injury to a traveller passing from the public highway to a road leading to the station of the Vermont and Massachusetts Railroad, the defendants were liable. It is important to bear in mind the character of this way, leading to the station of the railroad. The counsel have spoken of it as a road by dedication. The facts as to its origin are stated in the report. It was a way opened on the north side of the railroad track, and parallel with it, to enable persons to pass to and from the station. It had been recently opened, and was used for this purpose. There was nothing to show a dedication of this road to the public, and a surrender of the control of the same by the railroad corporation; nothing to show that the corporation might not, the next month, shut it up, and open another way. It was, to all intents and purposes, under their control, the public having only an implied license to pass over it to and from the station. Whenever it shall have acquired a different character, and shall by dedication have become a public highway, so far forth as that the railroad corporation will be taken to have lost all control over it as their way, the public duty may devolve upon the town of Wendell, of keeping the same, and their own highway in the part leading to it, in safe and convenient repair, or to give the notice required by *St. 1846, c. 203, § 3*. We think, upon the facts stated in the present case, the instructions of the court of common pleas were right, and that the defendants were not liable for an injury sustained by a traveller passing from the highway to the way leading to the railroad station, by an

obstruction which furnished no ground of complaint against the town in reference to the public travel on the highway.

Judgment on the verdict.

DAVID NELSON vs. CHARLES THOMPSON & others.

A writing, signed by the plaintiff in an action of assumpsit, declaring that it was commenced without his authority or consent, and that he thereby discharges the same, is no defence to the action, when specified in defence under the general issue.

THIS was an action of assumpsit upon a promissory note. The defendants pleaded the general issue, and specified in defence a discharge of the suit by the plaintiff. At the trial in the court of common pleas, before *Wells*, C. J., the only evidence introduced by the defendants was a writing, signed by the plaintiff, in the following words: "I hereby certify, that the suit now pending in the court of common pleas, in my name, against Charles Thompson & others, was commenced without my authority or consent, and I hereby discharge the same." No notice was given of any objection to the right of the attorney for the plaintiff to appear, other than the filing of the above specification of defence. The presiding judge ruled, that the written paper did not, of itself, constitute a defence to the action. The jury, thereupon, returned a verdict for the plaintiff, and the defendants excepted.

G. T. Davis and *C. Allen*, for the defendants, cited *Howe's Practice*, 32; *Colby's Practice*, 22; *Cleverly v. Whitney*, 7 Pick. 37; *Wilson v. Mower*, 5 Mass. 411; *Eastman v. Wright*, 6 Pick. 322.

D. W. Alvord and *G. D. Wells*, for the plaintiff, cited Rule IV. of C. C. P., *Colby's Practice*, 431; *Boynnton v. Willard*, 10 Pick. 169; *Jackson v. Stewart*, 6 Johns. 34; *Proprietors v. Bishop*, 2 Verm. 234; *Denton v. Noyes*, 6 Johns. 296; *Steph. Pl.* (1st ed.) 70 & seq.; 1 Chit. Pl. (6th Am. ed.) 481 & seq.; *Rob-*

 Alexander v. Pitts.

bins v. Hayward, 16 Mass. 524; *Langdon v. Potter*, 11 Mass. 313; *Proprietors of Monumoi Great Beach v. Rogers*, 1 Mass. 159, 163.

METCALF, J. We cannot see any legal ground for these exceptions. The defendants pleaded the general issue, and went to trial upon it; and the jury could only find that they promised, or did not promise, as the plaintiff had alleged in his declaration. The paper which the plaintiff had signed, declaring that the suit was commenced without his authority or consent, and that he discharged the same, had no tendency to prove that the defendants were not justly indebted to him on the note. A discharge of the suit was not a discharge of the defendants from their obligation to pay the note on which the suit was brought. It was not a release. Nor was it evidence of payment, or of any other fact which could have been pleaded in bar before the *St.* of 1836, c. 273, took effect, and which would have warranted the jury to find that the defendants did not promise, as the plaintiff had alleged. And since that statute took effect, nothing can be given in evidence, under the general issue, which could not before have been so given, or have been pleaded in bar. Pleas in abatement, and motions to dismiss, and the time and order in which they are to be made, are not affected by that statute. The defendants, therefore, gained nothing by filing their specification; for it contained no matter of law or of fact, "in defence of the action," within the true meaning of *St.* 1836, c. 273. It contained matter which was ground only for abatement or dismissal, or for staying proceedings. And such matter, unless it arises *puis darrein continuance*, cannot avail a defendant after he has pleaded in chief.

Exceptions overruled.

FORDYCE ALEXANDER vs. ELISHA J. PITTS.

Where the advertisement and notice of sale of real estate, for non-payment of a tax of three dollars and thirty cents, state the amount of the tax to be four dollars and twelve cents, the sale is void.

THIS was a real action, tried before *Dewey, J.*, and by him

reported, for the consideration of the whole court, after a verdict for the demandant. The tenant claimed title to the demanded premises, under a collector's sale of the same for non-payment of taxes, assessed on Mosely Clapp. To the validity of this title, the demandant, who claimed under a subsequent deed from Clapp, objected, among other reasons, because the tax assessed to Clapp upon real estate, was \$3.30; but the advertisement and notice of sale by the collector stated the amount of tax on real estate at \$4.12. The collector testified that, in point of fact, he sold only to satisfy the tax of \$3.30 and his fees, and that the land did not sell for enough to pay the fees, over and above the tax.

The court were to enter such judgment, or make such further order, as might be proper.

G. T. Davis and C. Allen, for the tenant, cited *Mussey v. White*, 3 Greenl. 296; *Sprague v. Bailey*, 19 Pick. 436; *Blackburn v. Walpole*, 9 Pick. 102; *Torrey v. Millbury*, 21 Pick. 67.

D. Aiken, for the demandant.

BIGELOW, J. The tenant's title in this case is derived from a sale of the estate by the collector for non-payment of a tax. To defeat the title thus acquired, various objections have been taken to the validity of the tax, and to the regularity of the proceedings of the collector in advertising and selling the demanded premises, all of which we have not found it necessary to consider, because there is one which is decisive of the present case.

By Rev. Sts. c. 8, §§ 24, 25, it is provided, that a collector of taxes shall give notice of the time and place of sale of any real estate taken for taxes, by an advertisement thereof, to be published in the manner therein specified; which advertisement shall state the names of the owners, "with the amount of the taxes assessed on their lands respectively." It appears by the evidence, that in this case the tax assessed on the demanded premises, for which they were sold by the collector, was three dollars and thirty cents; but that the advertisement and notice of sale by the collector stated the amount of the tax to be four dollars and twelve cents; being an excess of nearly twenty five per cent. over the actual tax. There was there-

fore a failure by the collector to comply with the requisitions of the statute. The advertisement did not state the amount of the tax assessed on the land, but stated a wholly different amount, and, for all legal purposes, might as well have contained no statement whatever of the amount of the tax. To comply with the statute, the exact amount must be given. A deviation, however small, is fatal, because a rule of law cannot be made to fluctuate according to the degree or extent of its violation.

It is of great importance to the rights of property, that positive regulations of statute, which authorize its seizure and sale, without the consent of the owner, should be strictly complied with. These regulations are the legal formalities, as essential to the validity of the sale and the transfer of title, as are the common and ordinary forms of making and executing deeds between individuals. It is upon this principle that sales of real estate by executors and administrators for the payment of debts, under a license of court, have uniformly been held invalid, as against those whose interests are affected thereby, unless every essential requisite and direction of law have been faithfully complied with. See *Knox v. Jenks*, 7 Mass. 488; *Colman v. Anderson*, 10 Mass. 105; *Leverett v. Armstrong*, 15 Mass. 26; *Pierce v. Benjamin*, 14 Pick. 356; *Farnum v. Buffum*, 4 Cush. 260; *Osborn v. Baxter*, 4 Cush. 406.

It was urged in argument, by the counsel for the tenant, that the provision of the statute, requiring the amount of the tax to be stated in the advertisement, was directory merely, and did not constitute a condition precedent to the validity of the sale. But we cannot so regard it. The object of the legislature in enacting this provision was to give notice of the amount of the tax to the owner of the land upon which it was assessed, that he might appear and discharge the tax according to the provision in § 28, and thus prevent the sale. In case of non-resident owners of real estate, having no attorney in the town where the land is situated upon whom a demand can be made under § 20, the first notice to the owner of the amount of the tax, required by law, is in the advertisement and notice of sale under §§ 24, 25, 27. Besides; notice of the

Brainard & another v. Connecticut River Railroad Company.

amount of the tax might be material to enable persons to judge how much of the real estate would be equivalent to the tax and intervening charges; (that being all that the collector has power to sell under § 28;) and of the expediency of attending the sale, and bidding on the estate. It is therefore a provision of law, intended for the security and benefit of the citizen, and not a mere regulation of business, or mode of proceeding, having no effect on individual rights. Such being the case, it follows that this provision of the statute is in its nature a condition precedent to the validity of the sale by the collector, and cannot be regarded as directory only. See *Torrey v. Millbury*, 21 Pick. 67.

Judgment on the verdict for the demandant.

ALMON BRAINARD & another vs. THE CONNECTICUT RIVER
RAILROAD COMPANY.

The bill in equity, provided by St. 1849, c. 222, § 5, for enforcing the orders of county commissioners, respecting the manner of constructing a railroad where it crosses a public highway, can be maintained only by the mayor and aldermen of the city, or the selectmen of the town, within which the way is situated, and not by any individual inhabitant of such city or town, although he is owner in fee simple of the land over which the way is located.

THIS was a bill in equity, under the act of 1849, c. 222, § 5, to compel the defendants to comply with an order of the county commissioners, for the building of a bridge as a part of a certain highway crossed by the defendants' road in the village of Greenfield.

The bill alleged that the defendants, a corporation duly established by the laws of this commonwealth, in their location and construction of their road, crossed a certain highway or road situated in Greenfield, commonly called or known by the name of Newton Place, in the fee simple of which the plaintiffs were part owners, bounded as particularly

Brainard & another v. Connecticut River Railroad Company.

described in the bill, and, among other boundaries, by "the old burial ground," so called; that said road had been used as a common road to the lots adjoining it, and was to be kept open and occupied for that purpose, and also to be used as a common way from the town road to the old burial ground, for all persons; that the defendants, by the construction of their railroad, by excavations and embankments, had rendered said road wholly impassable, and of no use for the purposes aforesaid, and to the great injury of the plaintiffs, who owned lands on each side of said railroad; that the defendants presented their petition to the county commissioners, in December, 1847, stating therein that they had located their road through Greenfield and certain other towns, crossing highways in the same, and praying the commissioners to view the line of the railroad, and the several crossings mentioned, and to make such order concerning the same, as the public good, in their opinion, might require; that upon their petition, and after due proceedings, the commissioners made, among other orders, the following: "The Newton Place, in the village of Greenfield, to cross over said railroad. Said company to build and forever maintain a good bridge, thirteen feet wide, and said railroad at the present grade of the street;" that the defendants had hitherto wholly neglected to comply with the requisitions of this order, by means whereof the plaintiffs had been greatly injured by reason of being deprived of the use of the road, as a passage to and from their lands on each side of the railroad, and also deprived of a convenient access from the west side of the railroad, to the business part of the village of Greenfield, which the plaintiffs were justly entitled to, and the public deprived of a convenient access to the old burying ground, for want of a crossing in compliance with the order of the commissioners. The prayer of the bill was for a specific performance by the defendants of the order of the commissioners, and for other relief.

The defendants demurred to the bill, assigning for cause, among others, that the court had no jurisdiction to enforce the specific performance prayed for.

C. P. Huntington, for the defendants.

A. Brainard, for the plaintiffs.

The opinion was delivered at the September term, 1852.

BIGELOW, J. This bill is brought under St. 1849, c. 222, § 5, by which jurisdiction in equity is given to this court, to compel railroad corporations to raise or lower any turnpike, highway, or town way, when the county commissioners have decided, in due and legal form, that such raising or lowering is necessary for public security; and to compel railroad corporations to comply with the orders, decrees and judgments of county commissioners, in all cases touching obstructions by railroads in any of such ways.

The bill sets out, with sufficient distinctness, that the way, which is alleged to be obstructed by the defendants, by their failure to erect a bridge over their railroad, in compliance with an order of the county commissioners, is a highway or common road. Indeed, without such averment in the stating part of the bill, no case within the equity power of the court would be set out; because, by the express terms of the St. of 1849, § 5, above cited, the jurisdiction in equity is limited to cases of turnpikes, highways and town ways. Under this provision, it is clear that the court have no power to enforce any order of the county commissioners in relation to a merely private way.

Assuming, therefore, that in this particular the bill is rightly framed, and duly sets out a way within the terms of the statute, so as to give this court jurisdiction in equity, the important question remains, whether the present plaintiffs have any right to maintain a bill in their own names, for the purpose of enforcing, as against the defendants, the decree of the county commissioners, set out in the bill, in relation to the mode of constructing their railroad in crossing the public way in question. If they have no such right, then the demurrer is well taken. Story Eq. Pl. § 541.

The section of the statute of 1849, conferring equity jurisdiction in cases of this kind, makes no provision as to the parties by whom the remedy given is to be enforced. Upon recurring to the statutes, which have been passed relative to the mode of constructing railroads in crossing highways and

town ways, so as to adapt them to each other, it will be found that the right of making application to the county commissioners for any order and decree regulating the mode of constructing such crossings, is given only to railroad corporations, and to the selectmen of towns, or mayor and aldermen of cities, in which the ways are situated. Rev. Sts. c. 39, §§ 67, 68; St. 1846, c. 271, § 2. These statutes relate to the original construction of railroads in crossing public ways. So in the statute of 1842, c. 22, which was intended to give authority to the county commissioners to compel railroad corporations to change the construction of their roads which originally crossed highways on a level, by making them cross over or under the same, the power of making application to the commissioners was given exclusively to the selectmen of towns, and the mayor and aldermen of cities, who act, in all their proceedings under this statute, in their official capacity, for the town or city, and as their agents. *Roxbury v. Boston & Providence Railroad*, 6 Cush. 424. Under these provisions, individuals, in their private capacities, have no power to apply to county commissioners to make any order or decree respecting the mode of constructing railroads in crossing public ways. The legislature intended to vest in the mayor and aldermen of cities, and the selectmen of towns, the care and charge of the public interest touching such matters. This is in entire harmony with all other legislation in regard to public ways. The present plaintiffs therefore had no right or authority to apply to the county commissioners for the decree set out in their bill, respecting the mode of crossing the highway in question by the railroad of the defendants. That could only be done by the corporation itself, acting for its own interests, or by the selectmen of the town of Greenfield, representing the interests of the public. The decree was in fact passed, as alleged in the bill, upon the petition of the defendants themselves. If then the plaintiffs had no right to apply for the decree, and were not in any form parties to the proceedings by which it was obtained, surely they cannot ask to have it enforced. It would be an anomaly in judicial proceedings,

to enforce a judgment at the instance of those who were neither parties or privies to the proceedings.

It was urged in argument, that the statute of 1849, *c.* 222, §§ 1, 2, was intended to give to individuals the right to make application to the county commissioners, in certain cases, respecting the crossing of public ways by railroads. And so undoubtedly it was. But that right is confined expressly to cases arising under *Rev. Sts. c.* 39, §§ 79, 80, relating to the erection and maintenance of gates and the stationing of agents at such crossings; and does not extend to the mode of constructing a railroad for the purpose of crossing a public way. The case stated in the plaintiffs' bill is of the latter kind, and does not come within the provisions of *St.* 1849, §§ 1, 2.

It appears to us, therefore, that it would be contrary to the whole course of legislation on this subject to hold that the statute of 1849, *c.* 222, § 5, conferred any right on individuals in their private capacities, to seek, by a bill in their own names, the enforcement of the decrees of county commissioners respecting the mode of constructing railroads in crossing public ways.

There is another view of the case, which leads to the same result. The general rule of law is well settled, that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. When they suffer a wrong or sustain a damage in common with other members of the community, no personal right of action thereby accrues. The private grievance is merged in that of the public, and a remedy must be sought either by a public prosecution, or by a suit in the name of some one officially empowered to vindicate the rights of the public. So strictly is this held, that when one sustains an injury in common with the public, although from the circumstances in which he happens to be placed he may suffer more frequently or more severely than others, he has no individual right of action. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him; and

Brainard & another v. Connecticut River Railroad Company.

certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases much greater than that which was sought to be redressed. *Stetson v. Faxon*, 19 Pick. 147; *Proprietors of Quincy Canal v. Newcomb*, 7 Met. 276; *Smith v. Boston*, ante, 255. The same rule is recognized and applied in cases where equitable relief is sought, as well as at law. A recent case in England, *Sollau v. De Held*, 2 Simons, N. S. 133, contains a full discussion of this subject; and the principle is clearly stated, and the authorities sustaining it are fully reviewed in the elaborate judgment of the vice chancellor. Applying this well settled principle to the case at bar, it will be found that the bill sets out no special injury or damage to have been sustained by the plaintiffs. It only avers that a public way has been obstructed by the acts and omissions of the defendants, by means whereof the plaintiffs have been deprived of convenient access to their lands, and of a ready communication with the village. But this is an inconvenience or damage, greater perhaps in degree to the plaintiffs than to many others, (although no such averment is made in the bill,) but of the same kind with that sustained by the public. The case, therefore, which the plaintiffs set forth in their bill, is not one of a private or personal nature, in which they seek redress for an infringement of their individual rights, or security against any special injury or damage; but one of a public nature, in which the complainants seek to enforce a decree, which they had no power to apply for or procure, and in which they have no other right or interest than that which belongs to them in common with the whole public.

Besides; if there were no other objection to the bill, it would be fatal to its maintenance in its present form, that it is brought by the plaintiffs in behalf of themselves only, and not in behalf of all other persons in interest. Story Eq. Pl. § 126.

Bill dismissed.

COMMONWEALTH vs. SYLVESTER C. HENRY.

A justice of the peace, who was also a trial justice, issued a warrant, after *St. 1850, c. 314*, took effect, commanding a party charged with a crime to be brought before himself, or some other justice of the peace for the county; the defendant was brought before him, and tried and convicted before him, acting as trial justice, and appealed. It was held, that the defendant could not, on the trial of the appeal, object to the irregularity in the form of the warrant, it not appearing from the records or papers, that he took any such objection before the justice.

. THIS was a complaint for an assault and battery, and was addressed "to James W. Crooks, Esq., one of the justices of the peace within and for the county of Hampden." Crooks administered the oath to the complainant, as "justice of the peace;" and issued a warrant, signed by himself, as "justice of the peace," requiring the officers, to whom it was directed, to bring the defendant before "the subscriber, or some other justice of the peace within and for said county." At the time of issuing this warrant, Crooks held commissions both of justice of the peace and of trial justice, for the county of Hampden. The officer's return was in these words: "I have arrested the body of the within named Sylvester C. Henry, and have him before James W. Crooks, Esq., for examination." The record of the trial before the justice commenced with these words: "At a justice's court, holden before me, the subscriber, one of the trial justices within and for the said county of Hampden;" and was signed by Crooks, as "trial justice." The defendant pleaded that he was not guilty; and, being tried and convicted before the justice, appealed to the court of common pleas.

In that court, the defendant moved that the proceedings be quashed, because the warrant did not conform to the provisions of *St. 1850, c. 314, § 4*, and therefore the justice had no jurisdiction of the case, and the proceedings before him were void. But the presiding judge, (*Byington, J.*) being of opinion that the justice had jurisdiction of the subject matter of the complaint, and it not appearing by the papers in the case, that any objection was taken before the justice, refused to quash the proceedings, and the case proceeded to trial. The defendant, being convicted, alleged exceptions.

E. W. Bond, for the defendant. There is no evidence that the defendant did not object to the validity of the warrant at the time of his arraignment before the justice. The pleadings before a justice being generally oral, in criminal as well as in civil cases, it is not to be presumed that the objection was not taken, because it does not appear by the papers in the case. But if the objection was not raised before the justice, this fact cannot operate as a waiver of the defect. *Commonwealth v. Doty*, 2 Met. 18.

Clifford, attorney general, for the commonwealth.

METCALF, J. It is provided, by St. 1850, c. 314, § 4, that any justice of the peace may receive a complaint and issue a warrant, in a criminal case, as heretofore, but that the warrant, so issued, shall require the officer, who serves it, to carry the party, therein directed to be arrested, before a trial justice, who is authorized to proceed as though the warrant had been issued by a trial justice. In the present case, the complaint was made to Mr. Crooks, as justice of the peace; he signed the warrant as justice of the peace; and therein commanded that the defendant should be brought before him or some other justice of the peace, within and for the county of Hampden. The complaint was rightly made; but the warrant was irregular. Mr. Crooks, however, was a trial justice, as well as a justice of the peace, and had jurisdiction of the offence with which the defendant was charged in the complaint; the defendant was carried before him; and he acted in the matter as a trial justice. It does not appear, and we cannot presume, that the defendant took any exception to the warrant in the justice's court. He pleaded not guilty. On that plea he was tried and convicted; and, on bringing his case, by appeal, into the court of common pleas, he there, for the first time, objected to the irregularity of the warrant.

As the magistrate had jurisdiction, and every thing was right, except the process, we are of opinion that the defendant, by not objecting to the process while before the magistrate, waived all objections to it, and that the rulings of the court of common pleas were correct. See *McCall v. Parker*, 13 Met. 372. *Exceptions overruled.*

COMMONWEALTH vs. WILLIAM G. SHEDD & another.

An indictment for a conspiracy to cheat and defraud, which does not set forth the means intended to be used, is insufficient; and is not aided by averments of overt acts done in pursuance of the conspiracy.

THE defendants were convicted in the court of common pleas for the county of Hampden, upon an indictment which alleged that William G. Shedd and Sarah Clough, wife of one Leonard N. Clough, on the 22d of January, 1851, "at Chicopee, in the county aforesaid, being evil disposed persons, and wickedly devising and intending, not only to deprive one Joel Church of his good name, fame, credit and reputation, but also to defraud and prejudice the said Joel Church, then and there, with force and arms, did amongst themselves conspire, combine, confederate and agree together to cheat and defraud the said Joel Church of divers large sums of money;" and then proceeded to set forth the doing of certain overt acts by the defendants, in pursuance of this conspiracy.

The defendant Shedd afterwards moved in arrest of judgment, because the offence charged in the indictment was not fully and properly set forth; which motion being overruled by the court, (*Merrick, J.*, presiding,) he alleged exceptions.

E. W. Bond, for Shedd.

Clifford, attorney general, for the commonwealth.

DEWEY, J. The gist of the offence in a charge of conspiracy being the act of conspiring together, and not the acts subsequently done in pursuance thereof, the consequence has been the introduction of certain forms of charging this offence, doubtful in their character, and as to which there has not been an entire uniformity of decisions. Under the idea that the conspiracy is alone the substantial crime charged, the practice had become somewhat common to charge the offence in the most general terms, as that of a conspiracy to the prejudice of the rights of others, overlooking the distinction, whether the object of the conspiracy was a criminal object, or the criminality consisted in accomplishing an object, not in itself a crime, by criminal means.

The recent decisions in this commonwealth have, to a certain extent at least, settled what was before a matter of doubt, and, so far as the principles of those decisions are applicable to this case, they must govern it. 1. It is well settled that a general allegation, that two or more persons conspired to effect an object criminal in itself, as to commit a misdemeanor or a felony, is quite sufficient, although the indictment omits all charges of the particular means to be used. 2. It is equally well settled, that a general charge of a conspiracy to effect an object not criminal is not sufficient. The charge of such a conspiracy is to be accompanied with the further statement of the means the conspirators concerted and agreed to use to effect the object; and those means must appear to be criminal. 3. The charge of a conspiracy to cheat and defraud A. does not, *ex vi termini*, import a criminal object. Cheating and defrauding are ambiguous terms, and as well applicable to civil contracts, as to injuries inflicted wholly by breach of criminal law. A man may cheat and defraud another in the sale of articles of merchandise, and yet the case be one of civil wrong merely. It is therefore held, that it is not enough to charge generally the purpose of the conspiracy to be "to cheat and defraud;" but the means must also be set forth, that it may be seen that it was a conspiracy to effect the proposed object by illegal means. This is directly settled in the cases of *Commonwealth v. Eastman*, 1 Cush. 189, and *Commonwealth v. Hunt*, 4 Met. 111, 125. Hence it results, that the general charge of a conspiracy to cheat and defraud Joel Church, which is the form of the present indictment, is insufficient, and that the indictment will not authorize the court to enter a judgment and sentence thereon, unless the defect is aided by the allegation of various overt acts of the parties alleged to have been done in pursuance of the conspiracy.

The view which the court have taken of this question, in the cases of *Commonwealth v. Hunt* and *Commonwealth v. Eastman*, seems to require that in cases of indictment for conspiracy the offence should be fully charged, independently of any overt acts alleged to have been done in pursuance of the conspiracy. Thus, in the case of *Commonwealth v. Hunt*, it is

Fox & another v. Harding & another.

said by the court, that the indictment must "set out an offence complete within itself, without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it."

The great difficulty in giving effect to the allegation of overt acts, in an indictment for conspiracy, on a motion in arrest of judgment for insufficiency of the indictment, is this; that overt acts are merely alleged by way of aggravation of the offence, and though alleged, they need not be proved, and the alleged conspiracy might be found by the jury, without proof of the precise overt acts charged to have been done in pursuance of the conspiracy.

The indictment in the present case, charging only, in general terms, a conspiracy "to cheat and defraud one Joel Church of divers sums of money," and setting forth no illegal means, agreed upon or concerted by the parties to effect the same, as a part of such conspiracy, but merely setting forth overt acts of the parties, does not charge a conspiracy to do a criminal act, or to effect an object by any criminal means set forth upon the face of the indictment.

Judgment arrested.

HENRY FOX & another vs. JAMES F. HARDING & another.

If a special contract, whereby one party agrees to make certain machines for the other, who agrees, on his part, to furnish materials therefor from time to time, is broken by a neglect to furnish the materials, and the first party notwithstanding proceeds for some time with the work; the question, whether he thereby waives the breach, so as to preclude himself from recovering damages therefor, is a question of fact, to be determined by the jury upon all the evidence in the case.

In an action for the breach of a special contract, the plaintiff may recover as part of his damages such profits as would have accrued to him from the contract itself, if it had been performed; but not those which he would have realized from other contracts entered into for the purpose of fulfilling such special contract.

THIS was an action of assumpsit to recover damages for the breach of a written contract, set out in the first count of

Fox & another v. Harding & another.

the declaration, in which the plaintiffs alleged, that the defendants agreed to furnish the plaintiffs with stock for the manufacture of twenty fifteen feet engine lathes, the castings and forgings for seven lathes in three weeks, and for the remaining thirteen within ninety days afterwards; and also promised that the planing of the ways should be done within ten months from the date of the agreement, if wanted; and promised to pay the plaintiffs for finishing the said lathes, at certain rates mentioned, within four weeks after the work was finished; in consideration of which, the plaintiffs agreed to finish for the defendants twenty fifteen feet engine lathes, in the best possible manner and workmanship as to fits and finish, two to be finished on or before the 20th of January, 1848, another within three weeks afterwards, and the remainder at the rate of two a month, until completed. The plaintiffs then averred, that; relying upon the said promises of the defendants, they commenced their work of finishing the lathes; but by reason of the negligence and delay of the defendants in providing and furnishing the stock, castings and forgings according to their agreement, the plaintiffs were greatly hindered and delayed, and put to great expense; that they did finish five of the said lathes, two on the 24th of January, 1848, two in the month of March, and one on the 15th of April following, which were all delivered to and accepted by the defendants; by reason of which acceptance, the defendants became liable and bound, according to their agreement, to pay the plaintiffs therefor four hundred and fifty dollars; which, though requested, they had refused to do. The plaintiffs averred further, that the defendants had delayed and neglected to furnish sufficient stock, castings and forgings, to complete the remainder of the lathes, and that they had commenced and expended a large sum of money on the remaining fifteen lathes, which remained in an unfinished state, by reason of the defendants' neglect; that on the day of the date of the writ, the plaintiffs had requested the defendants to furnish the stock, castings and forgings for the remainder of the lathes, and to plane the ways according to their agreement, which the defendants had wholly refused to do, whereby the plaintiffs had been put to great

expense, had been thrown out of employment, and had lost the profits which they would have otherwise made. The declaration also contained the common money counts, together with a count for work and labor and materials, accompanied by a bill of particulars annexed to the writ.

At the trial in the court of common pleas, before *Byington*, J., it was in evidence on the part of the plaintiffs, that in the months of February, March and April, 1848, they made complaints to the defendants, that they did not furnish stock according to their agreement, and that the plaintiffs suffered damage in each of those months, and were obliged, in February, to discharge one of their workmen, in consequence of the defendants not furnishing materials, according to their contract; that in the month of March, 1848, the plaintiffs complained to the defendants that they did not furnish castings, to which the defendants replied, that they had expected them before, and the plaintiffs told the defendants that they could not do much until they had them; that the plaintiffs continued to work with such castings and forgings as were furnished, until within a few days before the commencement of this action, when they asked the defendants if they would furnish the castings for the lathes, so that they could have something to depend upon, and if they would do so in one or two weeks; to which the defendants replied that they would not agree to do it; whereupon the plaintiffs ceased to work on the lathes. There was no evidence that the plaintiffs, when they left off work, or prior to the commencement of the suit, gave the defendants any notice that they did so on account of the failure or neglect of the defendants to furnish castings and forgings according to contract.

On this evidence, the defendants requested the judge to instruct the jury, that if the plaintiffs worked any considerable time, after a breach of the contract by the defendants' failure to supply castings, and finally abandoned the work and commenced this action, without notifying the defendants that they abandoned the work on account of such breach, the jury should presume that the plaintiffs waived any claim of damages therefor.

The presiding judge declined to give the instruction requested, but instructed the jury, that whether the plaintiffs waived their right to damages for any breach of the contract, was a question of fact, to be determined by the jury upon the evidence as to the plaintiffs' course of dealing with the defendants, and upon other competent evidence; and that if the plaintiffs, after a waiver, continued to work under the contract, and there was no further breach of it, the plaintiffs could not recover the damages so waived; but if any breach took place subsequently, the plaintiffs might recover therefor, unless waived in like manner.

As to the plaintiffs' claim for the damages caused by a loss of the profits which would have been realized from a complete execution of the contract by the plaintiffs, the defendants requested the judge to instruct the jury, that they could not, in any event, go into any calculation as to the probable profits to have been made by the plaintiffs, from the complete execution of the contract; nor could such profits enter into the assessment of damages. But upon this point, the jury were instructed, that the profits and gains which the plaintiffs would have made by the contract, and which they lost in consequence of a breach thereof by the defendants, were recoverable as damages; and that by profits were to be understood those directly resulting from the business, and not speculative profits.

The jury returned a verdict for the plaintiffs, and the defendants excepted.

H. Vose, for the defendants. 1. The question of a waiver of damages by the plaintiffs, was not, a fact to be found by the jury on the evidence; but the jury should have been instructed that the other facts in the case raised a presumption of a waiver by the plaintiffs; the right to rescind and the right to claim damages for the same breach, being analogous rights, and governed by the same rules. *Shaw v. The Turnpike*, 3 Pennsylv. 445; *Brinley v. Tibbets*, 7 Greenl. 70; *Thayer v. Wadsworth*, 19 Pick. 349. Whether certain facts, to be found by the jury, amount to a waiver, is a question of law for the court. *Shaw v. The Turnpike*, 2 Pennsylv. 454. The

rule of damages in this case, is "the value of the labor performed or services rendered down to the time of the abandonment of the contract." *Planché v. Colburn*, 8 Bing. 14; *Mead v. Degolyer*, 16 Wend. 632; *Moulton v. Trask*, 9 Met. 577. 2. In an action for the breach of a contract, profits to have been realized from the complete execution of the contract are not a subject of damages. Sedgw. on Damages, (1st ed.) 34, 35, 36; 2 Kent Com. (6th ed.) 480, note; *Dwyer v. Gurry*, 7 Taunt. 14; *The Schooner Lively*, 1 Gallis. 315, 325; *Sargent v. Franklin Ins. Co.* 8 Pick. 90; *Barnard v. Poor*, 21 Pick. 378; *Porter v. Woods*, 3 Humph. 56.

W. G. Bates, for the plaintiffs. 1. Whether or not the plaintiffs had waived the breach of the contract, was a question of fact for the jury, and not of law for the court. *Savage Manufacturing Co. v. Armstrong*, 5 Shepl. 34; *Cox v. Bennet*, 1 Green, 165. 2. The rule of damages was properly stated by the court of common pleas. *Masterton v. Brooklyn*, 7 Hill, 61; *Johnson v. Arnold*, 2 Cush. 46; *Koon v. Greenman*, 7 Wend. 121; *Shannon v. Comstock*, 21 Wend. 457; *Merrill v. Ithaca & Owego Railroad*, 16 Wend. 589.

BIGELOW, J. Two questions are presented by the bill of exceptions in this case. The first arises on the refusal of the court to instruct the jury, that they were bound to presume a waiver by the plaintiffs of all right to recover damages for a breach of the contract declared on. We think that the judge was right in this refusal, and that the question of waiver was properly submitted to the jury on the evidence, as a question of fact, for their determination. Indeed, it may be laid down as a general rule, that the question, whether the evidence in any case establishes a waiver of any legal right by a party, is one of fact to be settled by the verdict of a jury. There may be cases, in which the facts are few and simple, and the acts or admissions of parties clear and unequivocal, when it would be the duty of the court to instruct the jury, that certain legal rights, upon which a party might otherwise have relied, have been surrendered and can no longer be insisted on; but these are cases where the law affixes certain consequences to acts of parties, when clearly and indisputably proved. So too in

judicial proceedings, for the furtherance of public justice, and the discouragement of dilatory pleas and technical objections, parties who do not seasonably avail themselves of their legal rights, are held by courts to have conclusively waived them. But, ordinarily, where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine, how far parties have waived any of their legal rights. In all questions of this sort, so much depends on the intent with which parties act, that it would be impossible for courts to establish any certain rule by which all cases could be governed. They must necessarily be left to the determination of juries, whose peculiar province it is, to ascertain the intent of parties as gathered from the various facts and circumstances proved in each particular case. And such we understand to be the doctrine recognized and established by judicial decisions. *Union Bank of Georgetown v. Magruder*, 7 Pet. 287; *Hill v. Hobart*, 4 Shepl. 164.

But on looking into the facts proved in this case, we are very clearly of opinion that the instruction asked for by the defendant, even if it were the duty of the court to pass definitively on the question of waiver, was wholly unwarranted by the facts. It appears by the evidence, that the plaintiffs continued to fulfil their part of the special contract long after the defendants had omitted to perform theirs, and that, finally, after a demand on them by the plaintiffs to supply the castings, which they had agreed to furnish, and a refusal so to do, the plaintiffs ceased their efforts to complete the work, and commenced this action for the recovery of damages for the breach of the contract by the defendants. Upon these facts, the defendants contend that the contract was virtually rescinded and that the plaintiffs have waived all right to damages. But this position is wholly untenable. It would, in effect, be giving to the party that had broken his contract, the benefit of an entire release therefrom, merely because the party with whom he contracted, and who was not in fault, had forborne for a time to exact the strict performance of the bargain. The

utmost that under these circumstances could be reasonably contended for was, that the acts of the plaintiffs showed a waiver of the contract so far as related to the time at which the defendants had agreed to supply certain castings and other materials. If therefore, when the plaintiffs, a few days prior to the commencement of this suit, called on the defendants to fulfil their contract, the defendants had been ready to comply with the demand, it might with some show of reason be contended that the plaintiffs had waived all claim for damages up to that time. But there are no facts in the case which tend to show any other waiver of the agreement. With this exception, the contract still remained in full force, and both parties were bound by its stipulations. The fallacy of the argument on the part of the defendants consists in treating the contract as rescinded. It was, at most, waived in part only, and therefore the final refusal of the defendants to furnish the castings, on the plaintiffs' demand, was a breach of the contract, of which there had been no waiver, and for which this action can well be maintained.

The instruction of the court upon the question of damages, remains to be considered. The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit. To illustrate this by the case at bar. The

Norton v. Palmer.

plaintiffs had a right to recover such sum in damages, as they would have realized in profits, if the contract had been fully performed. To ascertain this, it would be necessary to estimate the cost and expense of work and materials in completing the contract on their part, and to deduct this sum from the contract price. The balance would be the profit which would have accrued to them out of the contract itself, if it had been fulfilled, and which they have a right to recover in addition to such further sum as would compensate them for the labor and materials supplied towards the completion of the contract. But if the plaintiffs had offered to prove, in addition to this, that in consequence of the breach of the contract by the defendants, they had lost other contracts by which they would have realized large profits, and which they had entered into for the purpose of fulfilling their contract with the defendants, the evidence would have been wholly inadmissible; because such collateral undertakings were not necessarily connected with the principal contract, and cannot be reasonably supposed to have been taken into consideration when it was entered into. Such profits are too uncertain, remote and speculative in their nature, and form no proper basis of damages. The instructions given by the learned judge of the court of common pleas were entirely in conformity with these principles, and the defendants' prayer for instruction on this point was rightly refused. See *Masterton v. Brooklyn*, 7 Hill, 61; *Batchelder v. Sturgis*, 3 Cush. 205.

Exceptions overruled.

LORENZO NORTON vs. FREDERICK A. PALMER.

A party, duly appointed under the laws of the late republic of Texas, "to the succession" of a person deceased there, is not accountable in this state for personal property held by him in that capacity.

THIS was an action of trover, brought by the administrator of Thomas Sheldon, against the administrator of Horace

Palmer. The defendant relied for his defence on the appointment of his intestate, by the proper tribunal of the late republic of Texas, as an administrator, or "to the succession" of Thomas Sheldon, deceased in Texas, before its annexation to the United States, under which appointment he held the property sued for. The facts of the case are sufficiently stated in the opinion of the court.

R. A. Chapman, for the plaintiff.

W. G. Bates and *N. T. Leonard*, for the defendant.

BIGELOW, J. It is a well settled rule of law in this commonwealth, that an executor or administrator, duly appointed under the authority and jurisdiction of another state or country, acquires a good title to the personal property and assets of his intestate, which are there found, and which come to his hands by virtue of such appointment, and that he is to be held accountable therefor only in the legal tribunals of the state or country under which he holds his office. *Selectmen of Boston v. Boylston*, 2 Mass. 384; *Stevens v. Gaylord*, 11 Mass. 256; *Campbell v. Sheldon*, 13 Pick. 23; *Fay v. Haven*, 3 Met. 114.

The simple question now to be determined is, whether the case at bar falls within this principle. By reference to the documents and evidence in the case, it appears that at a probate court held in the republic of Texas, for the county of Harris, on the 27th of November, 1838, a decree was passed on the petition of the defendant's intestate "for the succession of Thomas Sheldon, deceased, with the benefit of inventory," by which the following matters were adjudged and decreed:

1. That certain persons (naming them) were the descendants and lawful heirs of Thomas Sheldon, late of said county of Harris, deceased.

2. That Lucy P. Sheldon and Horace Palmer (defendant's intestate) were the lawful guardians of five of said heirs who were minors.

3. That the authority of said Horace Palmer (defendant's intestate) to act for and in behalf of the adult heirs was full and sufficiently attested, and was recognized accordingly.

4. That the prayer of said Palmer's petition be granted, and that he be authorized to take possession of the property, real and personal, and all the rights and credits of Thomas Sheldon, late of said county, deceased, and to hold the same for the use and benefit of said heirs, being subject to and chargeable with the debts of said Thomas Sheldon, deceased, to the amount of the "inventory of succession," of record in that court.

5. That in case any further assets of said Thomas Sheldon, deceased, should come to the hands and possession of said Palmer, he was to cause a supplemental inventory thereof to be filed.

This decree seems to be very plain on its face; and by its terms, under the authority of a probate court in another country, vested in Horace Palmer, the defendant's intestate, all the personal property of Thomas Sheldon, deceased, there situate, to be administered upon by him. It in all respects confers an authority equivalent to that given by letters of administration granted under our own jurisdiction. If, however, there were any doubt as to the effect of this decree, it is made entirely clear by the evidence, especially by the testimony of Benjamin F. Tankersley, Esq., a counsellor at law in Texas, whose deposition is in the case, by which it appears, that the defendant's intestate was vested with all the powers, rights and authority, and subject to all the duties and liabilities, of an administrator on the estate of Thomas Sheldon, deceased. Upon an examination of the ordinance of 1836, passed by the general council of Texas, under which said Palmer received his appointment by virtue of the decree above cited; the act of the republic of Texas, passed in February, 1840, "regulating the duties of probate courts and the settlement of succession;" and also the act of July, 1846, of the state of Texas, being an act to organize probate courts; it appears to us, that the statements of Mr. Tankersley, as to the rights and powers of persons appointed under a decree similar to the one by which the defendant's intestate was appointed, are entirely correct and in conformity with the legal enactments to which they relate.

Upon this evidence there can be no doubt, that Horace Palmer, the defendant's intestate, was duly appointed to the office of administrator, or, to use the phraseology of the civil law, "to the succession" of Thomas Sheldon, deceased, in Texas, by a decree of a competent tribunal of the republic of Texas, in November, 1838, and that, by virtue thereof, the personal property and assets of said deceased within that republic came to, and were vested in him, to be administered upon and accounted for in said republic, to the legally constituted authorities thereof. It follows therefore that the personal property which is the subject matter in controversy in this suit, having come to the possession of the defendant's intestate in Texas, by virtue of his appointment as administrator of said Sheldon's estate there, was rightfully in his hands, and that, upon the evidence in this case, no action can be maintained against the present defendant for a conversion thereof.

We have not found it necessary to consider the evidence bearing on the question of the domicil of Thomas Sheldon, at the time of his death, because we are satisfied it is wholly immaterial in the decision of this cause. The reason for disregarding it is well stated by Jackson, J., in his learned opinion in *Stevens v. Gaylord*, and cannot be strengthened by repetition. The result is, that the plaintiff must become nonsuit.

PERLEY COOK *vs.* CAMDEN H. BABCOCK.

S. conveyed land to H., describing it as bounded "north on the line of Blandford"; the line of the town of Blandford was subsequently established by act of the legislature; after which H. conveyed to C. by a similar description. It was held, that the line so established was the northern boundary of the land included in the deed from H. to C.; and that parol evidence was inadmissible to show that, prior to this act of the legislature, the line of Blandford was understood and reputed to be farther north than the line so established, and was defined by a line of marked trees, and that the deed from H. to C. was intended and understood by the parties to convey the same land included in the deed from S. to H.

This was an action of trespass *quare clausum fregit*. The

defendant pleaded the general issue, and specified in defence property in himself. At the trial in the court of common pleas before *Mellen, J.*, the jury returned a verdict for the plaintiff, and the case came before this court on a bill of exceptions, the substance of which appears in the opinion.

M. Wilcox, for the defendant.

W. G. Bates and *R. A. Chapman*, for the plaintiff.

SHAW, C. J. On the trial of this action, the whole controversy turned on a question of boundary. The plaintiff asserts a title to a strip of land, now admitted to lie within the town of Chester, adjoining its southern boundary on the town of Blandford, but which the plaintiff insists, did formerly lie within the territory of the town of Blandford, on its northerly line, adjoining the town of Chester. The dividing line between Blandford and Chester was fixed by two acts of the legislature, passed respectively February 22, 1809, and June 13, 1810. These acts did not purport to set off any territory from one town to the other, but only to establish the true boundary.

The deed under which the plaintiff, by mesne conveyances, claims title, that of Thomas Herrick to Stephen and Henry Clark, describes the land granted, as "lying in said Blandford, part of lot 35, and bounded as follows: north, on the line of said Blandford," &c. The Clarks mortgaged back to Herrick by the same description; Herrick assigned to Starkweather, and Starkweather to the plaintiff. The deed from Herrick to Clark bears date the 18th of January, 1815, being, as will appear by a comparison of dates, several years after the north boundary line of Blandford had been fixed. The plaintiff gave in evidence a deed from Abiah Sheldon to Thomas Herrick, dated the 16th of November, 1807, and a deed from John Blair, 2d, to Abiah Sheldon, dated the 2d of December, 1806, of the same premises, described as lying in Blandford, and bounded north on the line of the township. The plaintiff then offered evidence tending to show that, prior to said acts of the legislature, the dividing line of the town of Blandford was understood and reputed to run farther north than the dividing line of the towns, as fixed by said acts; that said ancient line was defined by a line of marked trees; and contended

that the deeds of Blair to Sheldon and Sheldon to Herrick, conveyed the land as far north as the north line of Blandford was then understood and reputed to be, and that the deed from Herrick to Clark, though made after the north line of the town had been thus fixed, was intended to convey the same land, which he had acquired, and extended to the old reputed line, and included the strip lying between said old line and the line as thus fixed, although such land was then situated in Chester by the legislative establishment of the line. This evidence, though objected to, was admitted; and although the defendant requested the court to instruct the jury, that by force of this deed the plaintiff could not claim land lying in Chester, and north of the north line of Blandford, the court declined so to instruct, but directed the jury that this was *prima facie* evidence that nothing north of the line of Chester passed by it, but that it was not conclusive; and it was left to the jury upon the evidence to decide whether the old line was intended, and if so, to find for the plaintiff.

The court are all of opinion that this evidence was not regularly admissible to control the precise description in the deed, and that the direction to the jury was not correct. When the description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction, or for the admission of parol evidence, to prove that the parties intended something different. A conveyance of land, like a devise of land, is required by law to be in writing; and registration is provided for, for the information of all parties. It is the intention of the parties, thus expressed and recorded, and not an intent to be proved by evidence *aliunde* and not expressed, which must govern. When, indeed, upon application of the description to the land, it is doubtful what was intended, this is a latent ambiguity, and then evidence *aliunde* may be given; as where a description gives the line as running to a maple tree marked, and two maple trees are found, either of which would answer the description. So here, if the words had been, the "reputed" line; or the "supposed" line, or words of that description. But the deed from Herrick to Clark, on which the question arises, was

made after the dividing line between Blandford and Chester had been established by law, and must be presumed to have been known by the parties, from the use which they made of it in the deed, as a monument. There are two expressions in the deed, precise and unambiguous, admitting of no construction; first, the subject matter of the conveyance, land lying in Blandford; second, "bounded north on the town line." Nor is it enough to prove a mistake in the deed, by showing from the conveyancer, or any other evidence, that the grantor intended to convey by a supposed old line, not then the true town line. That would prove only an intention to convey land, not executed by deed, which by law would pass no estate. In this respect there seems to be no substantial distinction between a devise by will and a conveyance by deed, and the authorities bearing on one are applicable to the other, for the general rule. *Miller v. Travers*, 8 Bing. 244; *Doe v. Chichester*, 4 Dow, 65; *Doe v. Hiscocks*, 5 Mees. & Welsb. 363; *Brown v. Saltonstall*, 3 Met. 423. That the same rule applies as well to a deed as a will, and also that a line shall be deemed a monument, is established in *Flagg v. Thurston*, 13 Pick. 145. Where land had been conveyed, bounded on a road, and afterwards the road was changed, by which a small strip of the land conveyed was separated from the remainder, and afterwards the grantee mortgaged, by a description similar to that by which it was conveyed to him, bounding on the road, it was held that this bound must be taken as the road then existed, and did not include the strip separated by the change of the road. *Stearns v. Rice*, 14 Pick. 411. So, in a recent case, a quitclaim deed of land in Great Barrington was held not to pass land in Sheffield, though described as the same land bequeathed, &c., and the bequest extended to lands in the county of Berkshire, which included both. *King v. Little*, 1 Cush. 436.

It is quite possible that such a construction may sometimes defeat the intentions of parties, if courts were at liberty to look beyond the deed to ascertain such intent; but the law, for wise purposes, having expressly provided that real estate shall be conveyed only by deed, capable of being recorded, and read and examined by all who have an interest in know-

ing its terms and legal effect, the rule in question must be adopted and steadily adhered to; otherwise, the purpose of the law would fail of being accomplished.

It is immaterial here to consider, whether by the deed from Sheldon to Herrick, before the town line was fixed by the legislature, the grantee took up to the then reputed line of Chester, or to the legal line as afterwards fixed; because, if he took any land north of the latter, it did not pass by his deed to Clark, made after that line was fixed.

It is hardly necessary to remark here, that when an act of the legislature professes to change the line between two towns, and set off part of one to the other, it cannot affect the title to any land then vested; and so when the true line has been long doubtful, and conveyances have been made, bounding on the reputed or supposed line, or line of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect, in passing the land up to such supposed line, though a different line be afterwards fixed by the legislature, as the true line, by a declaratory act. Such a conveyance would take effect, within the principles above stated, because such would be the intent of the conveyance, manifested by the deed.

Exceptions sustained.

NORMAN STRICKLAND vs. DAVID FITZGERALD.

In a bill in equity under the Rev. Sts. c. 81, § 8, to obtain possession of a horse, secreted from the plaintiff, so that it cannot be replevied, an allegation that the plaintiff was the owner of the horse and had the right of possession, is sufficient, without setting forth the particulars of his title; especially when the plaintiff waives an answer under oath.

THIS was a bill in equity, under the Rev. Sts. c. 81, § 8, to compel the delivery of a mare, detained from the plaintiff, and secreted so that she could not be replevied. The bill set forth, that the plaintiff, on the 3d of April, 1851, was the owner of: a certain bay mare of great value, to wit, of the value of five

hundred dollars, which mare was then in the possession of David Fitzgerald, of Chicopee, and that the plaintiff then demanded the mare, of Fitzgerald, at Chicopee, and that he then and there refused to deliver the same to the plaintiff, but illegally and unjustly detained the same, although the plaintiff then and there had a right to the possession thereof; and that Fitzgerald still detained, secreted and withheld the same from the plaintiff, so that the same could not be replevied, although the plaintiff had sued out a writ of replevin therefor, and the sheriff of the county had made diligent search for said property by virtue of said writ, and had endeavored to serve said writ.

The defendant demurred to the bill, assigning for cause, that the plaintiff had not specifically stated therein the possession, or such right to the possession of the mare, which the defendant was charged with detaining and secreting, as would give the plaintiff a right to maintain an action of replevin therefor; and that he had not stated in his bill in what manner he claimed his title to the mare.

A. L. Soule, for the defendant.

R. A. Chapman, for the plaintiff.

DAWKY, J. This bill is filed under the provisions of Rev. Sts. c. 81, § 8, authorizing a suit in equity "to compel the re-delivery of any goods and chattels, taken or detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied."

The plaintiff in his bill alleges that he was the owner of a certain bay mare which came into the possession of the defendant, who illegally and unjustly detains her, although the plaintiff has a right to the possession thereof. This is accompanied with the other proper averments that he cannot cause the same to be replevied, and that the defendant secretes her, &c.

The defendant demurs to the bill, and places his objection solely upon the ground that the plaintiff has not stated specifically his title, or, in other words, the manner in which he became the owner of the mare. To sustain the demurrer, the defendant relied upon the well settled English rule in cases in equity, which requires such specific statement, and also that

though the bill does contain an assertion of title in the plaintiff, it is not enough, if the facts are not stated from which the court will infer a title. Story Eq. Pl. §§ 730, 731; *Walburn v. Ingilby*, 1 Myl. & K. 61. This rule, it is said, was applied by this court in the case of *Clap v. Shepard*, 23 Pick. 228, and 2 Met. 127.

Looking at this case as a mere substitute for a writ of replevin of property, so secreted that it cannot be reached by the ordinary replevin process, we can see no good reason for requiring any further averment in the bill as to the property or title of the plaintiff than is required in a writ of replevin. The plaintiff here alleges that he is "the owner" of the bay mare, and that the defendant "illegally and unjustly detains her." The plaintiff seeks no discovery, but expressly waives an answer under oath, and of course any authorities as to cases of bills of discovery are inapplicable. The case is one arising under our statutes, and with the exception of the case of *Clapp v. Shepard*, is new. Though that case, to some extent certainly, was apparently decided upon the general principle that it was necessary to allege the facts that showed a title in the plaintiff in the property sought to be recovered by this process, and that a mere general allegation that he was the owner, was not enough, yet the case had its own peculiar features; as the bill disclosed the fact that the note sought to be restored to the plaintiff was a note payable to a third person. In such a case it might well be required that the further facts should be stated that would show a transfer of the note to the plaintiff, and that the general statement that he was the owner, was insufficient.

As applied to this case, we think the averments of ownership are sufficient in form to authorize us to overrule this demurrer.

Demurrer overruled.

Dwight & others v. County Commissioners of Hampden.

JONATHAN DWIGHT & others vs. THE COUNTY COMMISSIONERS OF HAMPDEN.

Under Rev. Sts. c. 24, § 48, one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages, without the joinder of his co-tenants.

THIS was a petition for a writ of mandamus, in which the petitioners set forth that they, together with Mary Bliss, the wife of George Bliss, were all the heirs at law of Jonathan Dwight, deceased: That the respondents had located a certain road over certain land owned by the petitioners and Mary Bliss, as heirs at law of said Jonathan Dwight, as tenants in common, and had awarded five hundred dollars as damages in gross to the heirs of Jonathan Dwight: That the petitioners by their petition represented to said commissioners, that their lands had been taken by them for said road; that they felt aggrieved at the decision of the commissioners, and at the inadequate damages, and appealed from said decision; and prayed for a jury to determine the matter of their complaint; which petition was duly presented to the commissioners; and that the commissioners decided,* that the prayer of the petition should not be granted, because Mary Bliss had not joined in the petition with the other heirs, the present petitioners. The petitioners therefore prayed this court that a writ of mandamus might issue to said commissioners, commanding them to order and allow the petitioners a jury or juries to hear and act upon the matter of said complaint; that is, to estimate the damages occasioned by locating said road over the petitioners' land.

The commissioners having been notified to show cause why a writ of mandamus should not issue against them, appeared and answered, in substance, that they refused to grant the prayer of the petitioners for a jury, because Mary Bliss, one of the heirs at law, did not join in the petition; so that all the owners of the land, as tenants in common, did not join in the petition for a jury to estimate the damages.*

W. G. Bates, for the petitioners.

N. T. Leonard, for the respondents.

FLETCHER, J. The simple question presented in this case is whether or not these petitioners were legally entitled to have a jury to assess their damages, though one of their co-tenants in common did not join in the petition to the respondents for that purpose. If the respondents were legally bound to grant the prayer of the petitioners for a jury to estimate the damages, the petitioners are now entitled to a mandamus; otherwise, they are not so entitled. The decision of this question depends entirely on certain provisions of the revised statutes.

Before the revised statutes, it was decided by this court, that one tenant in common of land, over which the commissioners had laid out a highway, could not apply for a jury, without the joinder of the other co-tenants. *Merrill v. Berkshire*, 11 Pick. 274. That decision was founded on the well established and familiar principle of law, that tenants in common must join in an action to recover damages for injuries to their common estate.

But there are some new provisions, introduced into the revised statutes, which have changed the law on this subject, and conclusively settle the present question. The sections from the forty eighth to the fifty third, inclusive, of the twenty fourth chapter of the revised statutes, are new, and were introduced with a view to afford a more complete remedy, than before existed, for all parties, who have several estates or interests at the same time in the same parcel of real estate. Though this statute may have reference, as its primary object, to cases of estates in dower, and other life estates, with the reversions and remainders in fee; or to dwelling-houses or stores, with the land appurtenant, let to a number of tenants for different terms of years, on conditions creating different rights and liabilities, and exposing them to different degrees of injury; still it is equally applicable, both in its terms and according to its true intent and spirit, to cases of estates owned and held by tenants in common. The provisions of the sections of the statute referred to are designed to enable all parties having several estates or interests to obtain justice, as the

Dwight & others v. County Commissioners of Hampden.

rights and interests of several parties may be adjusted and secured by means of a bill in equity. As one or more of several tenants in common may file a bill in equity to obtain an adjustment between the several co-tenants, of their respective rights and interests, so under the provisions of this act, some out of many tenants in common may apply for a jury to estimate the damages occasioned by taking their land held in common, for a highway, though all the co-tenants do not join in the application. The statute expressly provides for ascertaining and adjusting the damages of all, though only a part join in the petition. Provision is distinctly made that, whenever there shall be several parties having several estates or interests in any land taken for a highway, upon the application of any party interested, in the manner mentioned, the commissioners shall proceed in the manner particularly pointed out and prescribed, and that a jury shall be ordered to ascertain the damages in the premises. It is not necessary particularly to examine the course of proceeding as pointed out in the statute. The provisions are very full and explicit, as to notifying the parties, assessing and apportioning the damages, and as to the effect of the verdict upon those who become, and those who do not become parties. It is sufficient for the present case that the statute expressly provides that, whenever there shall be several parties having several estates or interests, upon the application of any party interested, in the manner mentioned, the commissioners shall proceed in the manner expressly provided, and that a jury shall be ordered. This is conclusive upon the present case. Here all the tenants in common, but one, applied for a jury, and under and by virtue of the provisions of the statute it was clearly the duty of the commissioners to have proceeded in the manner prescribed, and ordered a jury to assess the damages; and they having refused to do so, a mandamus must issue in compliance with the prayer of the petitioners.

The respondents in their answer state, that they refused a jury wholly on the ground that Mary Bliss, one of the tenants in common, did not join in the petition. This decision would have been correct as the law was before the revised statutes,

but was clearly incorrect under the new provisions of these statutes.

The decision in this case in no way conflicts with the decision in the case of *Burrows v. Taft*, 11 Met. 263, which was referred to in the argument. That case is distinct from the present; and in that no reference was made either by the counsel or the court to the new provisions of the revised statutes.

A mandamus must issue to the respondents, to summon a jury for the assessment of damages only, all the proceedings in the case to be in accordance with the provisions of the twenty fourth chapter of the revised statutes, sections forty eight to fifty three, inclusive.

ASA K. BRUCE vs. PETER R. KEOGH.

An application, of a debtor committed to jail on execution, to be admitted to take the poor debtors' oath, must, since St. 1844, c. 154, as well as under Rev. Sta. c. 98, be made to the jailer, and through him to a justice of the peace. And if such debtor, who has given bond for the prison limits, is admitted to take the oath on an application made by him directly to the justice, and thereupon goes without those limits, it is a breach of the bond.

THIS was an action of debt on a bond for the prison limits, executed by Joseph A. Merrill as principal, and by the defendant and John C. Farrell as sureties. The defence relied on was a discharge of Merrill by taking the poor debtors' oath. The facts of the case appear in the opinion.

E. W. Bond, for the plaintiff.

J. M. Stebbins, for the defendant.

BIGELOW, J. The right of the plaintiff to recover in this action depends on the question, whether Merrill, the principal debtor, was duly admitted to take the poor debtors' oath, and thus legally discharged from his imprisonment. The proceedings, under which the discharge was obtained, were intended to conform to St. 1844, c. 154, so far as it modifies the

provisions of Rev. Sts. c. 98. The objection taken to their validity is, that the debtor himself made application directly to the magistrate, instead of making a representation to the jailer, and through him to a justice of the peace, of his desire to avail himself of the benefits of the act for the relief of poor debtors.

As the jurisdiction of the magistrates, and their power to administer the oath to the debtor, are wholly derived from statute, it is essential to the regularity of the proceedings and the due discharge of the debtor, that the requisitions of the statutes should be strictly complied with. *Putnam v. Longley*, 11 Pick. 487; *Slasson v. Brown*, 20 Pick. 436; *Young v. Capen*, 7 Met. 287.

By Rev. Sts. c. 98, § 1, it is provided, that when any person, committed on execution for any debt, "shall represent to the jailer that he is unable to pay the debt, for which he is imprisoned, and is desirous to take the benefit of the law for the relief of poor debtors, the jailer shall make known the same to some justice of the peace for the county." Under this provision, as well as under the statute of 1787, c. 29, § 1, which preceded it, the practice has been uniform, to follow its directions, and make the application to the magistrate through the jailer. Such being the plain requisition of the statute, no other application would be legal, and a substantial compliance with it has always been deemed necessary. *Bussey v. Briggs*, 2 Met. 132.

By St. 1844, c. 154, § 10, it is enacted, that whenever any person shall be committed to jail on execution, whether he is in close confinement, or has given bond for the prison limits, and is desirous of taking the oath prescribed by law for poor debtors, "the proceedings shall be conformable to the provisions of law contained in the ninety eighth chapter of the revised statutes; provided, that the notice to be given to the creditor shall in all cases be given in the same manner as is provided in this act for the relief of persons arrested on mesne process." The single question therefore is, whether, by the true construction of this act, in cases of commitment on execution, the representation to the jailer of the debtor's desire

to take the oath, and the application by the jailer to the magistrate, are dispensed with, so that a notice may issue to the creditor upon an application made directly to the magistrate by the debtor. By reference to § 1 of this act, it will be found, that a debtor arrested on mesne process "may give notice in writing to any justice of the peace in the county where the arrest is made," that he is desirous of taking the oath; and by § 2, it is made the duty of the justice so notified to appoint a time and place for the examination of the debtor, and "to issue a notice thereof to the plaintiff." By these provisions, two notices are necessary in case of arrest on mesne process; first, the notice by the debtor to the magistrate; second, the notice by the magistrate to the creditor. When, therefore, it is provided in § 10, that, in cases of commitment on execution, the proceedings shall in all cases conform to Rev. Sts. c. 98, except in the "notice to be given to the creditor," it clearly refers to that notice only, and excludes the notice to the magistrate, which is to be regulated by Rev. Sts. c. 98. The act of 1844 carefully distinguishes between the notice to the magistrate by the debtor, and the notice by the magistrate to the creditor, and §§ 1 & 2 particularly prescribe the mode in which each is to be given. It cannot, therefore, be reasonably supposed, that these two notices would be confounded in § 10, and both included under the term of notice to the creditor. The intention of the legislature was, to leave the proceedings, in cases of commitment on execution, unchanged in all respects, and to be regulated under Rev. Sts. c. 98, except in the single particular of notice to the creditor, which was to be given according to the provisions of the act of 1844, c. 154, in case of arrest on mesne process; otherwise, there was no necessity of a separate provision for cases of commitment on execution, as they might have been included in the cases enumerated in § 1. We are therefore of opinion, that in this case the application should have been made to the jailer by the debtor, and by the jailer to the magistrate, in compliance with Rev. Sts. c. 98, § 1, and that, having been made directly to the magistrate by the debtor, it is not in conformity with the law, and is void.

It was urged in argument, that a notice to the creditor was equally effectual, whether given upon application by the debtor directly to the magistrate, or by a representation to the jailer and through him to the magistrate. This may be so, and many other modes of notice might be equally effectual. But the legislature has prescribed but one mode, and it is not for the court to supply by construction that which the legislature have not seen fit expressly to enact.

A question, similar in many respects to that which we have now considered, arising upon statutes containing provisions identical with those contained in the act of 1844, c. 154, and Rev. Sts. c. 98, has been before the supreme court of the state of Maine, and decided in conformity with the views herein given. *Knight v. Norton*, 3 Shepl. 337. See also *Hanson v. Dyer*, 5 Shepl. 96; *Neil v. Ford*, 8 Shepl. 440.

Judgment for the plaintiff.

**THE PRESIDENT, DIRECTORS, &c. OF THE WESTERN BANK vs.
JOHN MILLS. THE SAME vs. GEORGE DWIGHT & another.**

A bank agreed with D. to discount his paper, indorsed by M., to a certain amount, and that D. should leave with them, on deposit, one sixth of the several discounts; and D. agreed to give them the first offer of all his business; and it was also agreed, that either party might terminate the arrangement by giving ninety days' notice to the other. After obtaining some discounts, D. informed the bank that he should extend his discount to the full amount, and gave them a check for a sixth part of said amount, and received of the bank a certificate of deposit thereof, payable after ninety days' notice of his desire to withdraw it. D. took the benefit of the insolvent law; and M. gave his notes to the bank in renewal of the notes of D., on which he was indorser, the bank agreeing to prove the notes of D. against his estate in insolvency, and to apply the proceeds towards the payment of M.'s notes. It was held, that the entire proceeds of the discount not being payable by the bank on demand, the discount was so far void, under Rev. Sts. c. 36, § 58, that the bank could not prove the notes of D. against his estate; nor maintain an action against M., on his notes given in renewal of the notes of D.

THE first of these cases was an action of assumpsit to recover the amount of three promissory notes, signed by the

defendant, dated the 21st of June, 1850, and payable to the order of C. P. Bissell, the plaintiffs' cashier; one for \$2,000, and two for \$1,500 each; and payable in four months, from the 19th of June, the 25th of June, and the 14th of July, 1850, respectively.

The defendant pleaded the general issue, with a specification of defence, which stated, in substance, that the notes in suit were given in renewal of, or as a collateral security for, certain notes for similar amounts, and which fell due on the 19th and 25th of June, and the 14th of July, 1850, respectively, signed by the firm of Dean, Packard & Mills, (who had become insolvent since giving those notes,) and indorsed by the defendant, and discounted by the plaintiffs under an agreement made by them with said firm, which agreement was usurious, illegal and void, as being made in violation of the laws of this commonwealth; that there was no other consideration for the notes sued upon; that, at the time of making them, it was agreed between the parties to this suit, that the plaintiffs should prove the notes of Dean, Packard & Mills against their estate before the commissioner of insolvency, and apply the proceeds towards the payment of the defendant's notes; that the notes of said firm were offered for proof accordingly, but were disallowed by the commissioner, because made in violation of the laws of this commonwealth.

At the trial, the following facts appeared in evidence, by the testimony of Isaac Mills, called as a witness for the defendant: In the early part of October, 1849, an arrangement was made by the plaintiffs with the firm of Dean, Packard & Mills, whereby the latter agreed to open an account with the plaintiffs, who, on their part, agreed that the bank should give said firm a line of discount on their accommodation notes, indorsed by the defendant, not exceeding \$18,000; that Dean, Packard & Mills should do their business at said bank, and give the bank the first offer of all their business paper; that, for every \$6,000 of such accommodation paper discounted by the bank, Dean, Packard & Mills should leave on deposit \$1,000, being one sixth part of the amount discounted; and that collateral

security should be left with the bank for one half of the amount of the loan; and it was further agreed, that either party might terminate this arrangement, by giving ninety days' notice of their intention to the other. And, in accordance with this arrangement, the said firm deposited with the plaintiffs, as collateral security, sundry bonds, stocks and notes, some of which were furnished them by the defendant for that purpose. Among the securities, so furnished by the defendant, were certain notes of David R. Adams and of Eli G. Noble.

On the 15th of October, 1849, Dean, Packard & Mills's note for \$7,596, indorsed by the defendant, was discounted under this arrangement, and the proceeds placed to their credit, and some part of it immediately drawn out by their checks. On the 27th of October, the plaintiffs' cashier inquired of Isaac Mills, who managed the financial affairs of the said firm, how far they intended to extend the line of discount. I. Mills replied, that they should take to the amount of the \$18,000. The cashier then proposed, that Dean, Packard & Mills should give the plaintiffs a check for \$3,000, and he would give them a certificate of the same. I. Mills consented to this proposition, remarking, at the same time, that the bank would be getting the full benefit of the \$3,000 before the whole of the \$18,000 was discounted. He however gave a check to the cashier, and received a certificate of deposit, in the following words: "Western Bank, Springfield, Mass., 27 Oct. 1849. Messrs. Dean, Packard & Mills have deposited in this bank three thousand dollars to the credit of themselves, payable on the return of this certificate satisfactorily indorsed, after ninety days' notice of desire to withdraw the said \$3,000. C. P. Bissell, Cashier." And it was agreed that this deposit of \$3,000 should constitute a part of the collateral security to be given under the original arrangement; and it remained in the bank till the failure of Dean, Packard & Mills.

Isaac Mills also testified, that within a short time after giving the check for \$3,000, he got discounted, by the plaintiffs, accommodation notes of his firm, indorsed by the defendant, amounting, including the discount of the 15th of October,

to \$18,000; that these notes were renewed or paid, from time to time, as they became payable; and that Dean, Packard & Mills, after said arrangement was made, never gave the plaintiffs any notes indorsed by the defendant, except those discounted under this arrangement, or in renewal of those so discounted; and that whenever said firm had any note so discounted or renewed by the plaintiffs, they gave the plaintiffs a check for the amount of the note, in accordance with a rule at the bank; that during the time said firm were transacting business with the bank under said arrangement, on two occasions, they drew checks on the bank for less than \$600, which the bank refused to pay for want of funds; that at the time one of these checks was refused, said firm had, in addition to the \$3,000 then on deposit, funds in the bank sufficient to meet the check, but the check was refused in consequence of the omission of a clerk to place to their credit a sum deposited on the morning of that day; and on the other occasion, the balance of their account, in addition to the \$3,000 there on deposit, was not sufficient, by about seven dollars, to pay the check refused.

The agreement made with the cashier, and all his acts under that agreement, were made with the approbation of the directors of the bank. Isaac Mills further stated, that he informed the present defendant of the terms of the arrangements which he could make with the bank, and consulted him about it, and he supposed the defendant knew that the notes he was indorsing from time to time, were given under that arrangement.

On the 27th of May, 1850, the bank gave Dean, Packard & Mills written notice that the arrangement between them and the bank must cease at "the earliest practicable moment." Dean, Packard & Mills failed on the last day of said May, and went into insolvency on the 3d of June following. At the time of their failure, the bank held their accommodation paper indorsed by the defendant, given under the aforesaid arrangement, to the amount of \$18,000, \$5,000 of which was in notes of the dates, sums and times of payment, mentioned in the specification of defence. On the morning of the day

of the failure, the plaintiffs' cashier called at the office of Dean, Packard & Mills, and obtained from Mills the certificate of the \$3,000 deposit, which he afterwards applied to cancel two of the notes of said firm, not then payable.

The defendant, on the 7th of June, 1850, executed a mortgage of certain real estate to the plaintiffs, as security for his indorsement of the notes of Dean, Packard & Mills; on the 14th of the same month, he addressed a letter to the president of the bank, offering different security; and on the 17th of June, 1850, the defendant conveyed certain real estate to three trustees, to hold as security for his liability to the plaintiffs on said indorsements, and as security for his liabilities to sundry other parties.

On the 21st of June, 1850, the defendant signed and delivered to the plaintiffs a paper, of which the following is a copy: "In consideration that I am responsible to the Western Bank, as the indorser of Dean, Packard & Mills, I make the following propositions to said bank: That I will give my own notes for those I have indorsed, payable in four months from the time Dean, Packard & Mills's notes become payable; the same to be renewed for one half the amount, payable in three months from the time they become payable; the interest to be paid as on notes discounted. Said bank are to make sale of the collateral security held from Dean, Packard & Mills, and apply the same in part payment of my notes first mentioned. Said bank shall present and prove before the commissioner of insolvency the balance of the notes against Dean, Packard & Mills, and receive the dividends when made; the amount to be applied on my notes aforesaid. Said bank shall apply the collateral security, held from myself, upon my notes aforesaid, the same to be converted into cash, before there shall be a failure on my part to meet said notes as they become due, unless I can sell the same, or it shall be done by my trustees. In case said collateral security and the dividends aforesaid shall be insufficient to pay my notes aforesaid, as they become payable, then my trustees, to whom I have conveyed certain real estate, are to make sale of the same for cash, and pay my notes aforesaid. I hereby agree

to waive all my right to demand and notice upon all the notes I have indorsed for Dean, Packard & Mills, at the Western Bank. I am to withdraw the notes of D. R. Adams and Eli G. Noble from the bank. June 21, 1850. John Mills." The proposals made in this paper were accepted by the plaintiffs; and on the same day, the defendant executed and delivered to them, in accordance with his said proposals, twelve promissory notes, corresponding in amounts with those notes (twelve in number) of Dean, Packard & Mills, in the hands of the plaintiffs at the time of the failure of said firm, which were not cancelled by the application of the certificate of deposit of \$3000, and payable four months from the times when the said twelve notes became due respectively. And the defendant, pursuant to the agreement in the paper of the 21st of June, afterwards withdrew from the bank the notes of Adams and Noble.

The plaintiffs, on the 6th of July, discharged the mortgage of the 7th of June; and on the 16th of July sold, under an order of the commissioner of insolvency, certain collateral security delivered to them by Dean, Packard & Mills, under the arrangement of October, 1849, and applied the proceeds in payment of four of the twelve notes, amounting to \$3,400. There are now in the possession of the plaintiffs, eight notes of Dean, Packard & Mills, indorsed by the defendant, and given under said arrangement, and amounting to the sum of \$11,600; and the plaintiffs also hold the notes of the defendant of corresponding amounts, given in accordance with his proposal of the 21st of June, three of which are the notes in suit.

On the 30th of November, 1850, several of the principal creditors of Dean, Packard & Mills requested George Dwight and Edward A. Morris, the assignees of said firm, to object to the proof of the notes of the firm, held by the Western Bank, if they should be offered for proof before the commissioner. The defendant did not join in this request, nor was there any evidence in the case that he did any thing to prevent the proof of the notes. On the 10th of December, 1850, the plaintiffs presented said notes to the commissioner for proof. The assignees objected to the allowance thereof; and the

commissioner, on the 16th of December, after hearing the parties, decided against the proof of the notes, on the ground that they were given under an agreement in violation of the laws of the commonwealth. From this decision the plaintiffs appealed, and that appeal is the second case above named, in which case also, the foregoing facts appeared in evidence.

It further appeared, in the first named case, by the testimony of the attorney of the bank, that he, on the 9th of December, 1850, before presenting the notes to the commissioner, and also on the 16th of December, after the decision of the commissioner had been made, offered the notes of Dean, Packard & Mills to the defendant to prove before the commissioner; but the defendant refused to receive them. The witness did not recollect the reasons given by the defendant for refusing to receive the notes, but he believed something was said about the bank having agreed to prove the notes before the commissioner. The defendant then told the witness, that if these notes were not proved, he should not pay the notes he had given to the bank.

These cases were argued together by *S. Bartlett* and *G. Ashmun*, for the Western Bank, by *W. G. Bates* and *H. Vose*, for Mills, and by *H. Morris* and *H. Vose*, for Dwight and another.

METCALF, J. The fifty eighth section of c. 36 of the revised statutes is in these words: "No bank shall directly or indirectly make any loan, or grant any discount, unless the amount of the loan or the proceeds of the discount shall be payable by the bank, on demand, in specie, or in the bills of the bank; and every loan or discount, made contrary to the provisions of this section, shall be so far void, that the bank shall not be enabled to recover the amount thereof from the borrower, or from any other person; and every bank, offending against the provisions of this section, shall moreover forfeit the sum of five hundred dollars." Applying these provisions to the facts in the first of these cases, it is clear that the plaintiffs cannot recover on the notes in suit. The agreement between them and Dean, Packard & Mills, was, that the plaintiffs should discount their paper, to an amount not exceeding eighteen thousand dollars, and that they should leave in the bank, on

deposit, one sixth of the several discounts. On the 15th of October, 1849, the plaintiffs discounted a note of \$7,596, "under this arrangement." Twelve days afterwards, Dean, Packard & Mills informed the plaintiffs' cashier, that they should extend their discount to the full sum of eighteen thousand dollars, and gave the plaintiffs, at their cashier's suggestion, a check for one sixth of that amount, to wit, three thousand dollars, (probably a part of the former discount which had not been drawn out,) and the plaintiffs gave to them a certificate that they had deposited that sum, which was made payable after ninety days' notice of their desire to withdraw it. Discounts were soon after made by the plaintiffs, which made up the amount of eighteen thousand dollars. And the notes in suit were given in renewal of notes that had been discounted under the foregoing arrangement. The proceeds of the discounts were not made "payable by the bank on demand," but a part of those proceeds were put out of the control of the borrowers, and reserved for the use of the bank. The plaintiffs received interest on eighteen thousand dollars, of which the borrowers never had but fifteen thousand.

The arrangement made with the plaintiffs, by the defendant, on the 21st of June, 1850, when the notes in suit were dated, did not purge the discounts from their original taint, nor impair his right to make this defence. *Wynne v. Callender*, 1 Russell, 293; *Amory v. Meryweather*, 4 Dowl. & Ry. 86, and 2 Barn. & Cres. 573.

In the first of these cases, there must be

Judgment for the defendant.

In the second of these cases, the same reasons that prevent the plaintiffs from recovering against Mills justify the commissioner of insolvency in his disallowance of their claim against the estate of Dean, Packard & Mills.

Order of the commissioner affirmed.

GEORGE W. BURKE vs. CHARLES A. MILLER.

The testimony of one of the subscribing witnesses to a deed is sufficient to prove its execution; unless the judge, in his discretion, requires the production of the others.

When a witness is called to prove the signature of a deed, it is within the discretion of the presiding judge to allow the adverse party, who has not yet opened his case, to cross-examine the witness immediately, on the whole case, or to require him to wait and recall the witness, after having opened his case.

The acts and declarations of one party are not competent evidence to affect another, unless it is first proved that both have been engaged in a common purpose and design; and whether the evidence is sufficient to establish the concert between them, or proper to be laid before the jury as tending to establish it, is within the discretion of the presiding judge, and not a ground of exception.

This was a writ of entry to foreclose a mortgage, made by the tenant to Elbridge Hazen, to secure certain promissory notes, and attested by Charles W. Knox and by one De Wolf, and assigned by Hazen to the demandant.

At the trial in the court of common pleas, before *Byington, J.*, the demandant called Knox, one of the attesting witnesses, to prove the execution of the mortgage; but did not call De Wolf, the other attesting witness, for this purpose, nor give any excuse for not calling him. The tenant objected, that under the circumstances of this case, the demandant was bound to call the other witness, and that the mortgage was not sufficiently proved to entitle him to read it to the jury. But the judge overruled the objection, and allowed the mortgage to be read in evidence.

After the demandant had examined Knox as to the execution of the deed, the tenant began to cross-examine him as to the circumstances attending its execution, which would tend to support the tenant's plea and specification of defence; but the judge ruled, that as the demandant called the witness merely to prove the execution of the deed, in order to entitle him to read it to the jury, the tenant could not be permitted, at that time, to cross-examine the witness as to these circumstances, but that he might recall the witness after he had opened his case; and the questions then put were accordingly ruled out. The witness was subsequently recalled, and cross-

examined by the tenant, in support of his defence. The demandant then read in evidence his mortgage deed, assignment and notes, and rested his case.

Knox, on being recalled by the tenant, testified, that being a deputy sheriff, and having received a writ of attachment for service, in favor of Hazen against Miller, he went to Miller's house, accompanied by De Wolf and Hazen, on the day of the date of the mortgage; and he testified to many things said and done there by those persons and by Miller, which, the tenant contended, showed that De Wolf and Hazen went to Miller's for the purpose of obtaining the mortgage by fraud, and were acting together in concert for that purpose. This evidence was reported in the bill of exceptions, but is not material to be stated. After introducing this evidence, the tenant offered to prove certain declarations made by De Wolf to the wife and family of Miller, the latter not being present. This being objected to by the demandant, the judge ruled that the declarations were inadmissible, unless communicated to Miller; and there being no such evidence, they were rejected. The tenant, after introducing further evidence, renewed his offer to prove the declarations of De Wolf, but the evidence was rejected as before, and for the same reasons.

The demandant having introduced De Wolf as a witness, he was examined concerning the whole transaction, and the making and execution of the mortgage and notes; and, being inquired of, on cross-examination by the tenant, whether he had made to the wife of Miller the declarations above mentioned, he denied having made the same. The tenant then offered to prove that De Wolf had made the declarations in question; but the evidence was rejected, on the ground that it did not contradict any material or relevant testimony given by De Wolf.

There was much other evidence introduced at the trial, but only so much is reported in the bill of exceptions, as was necessary to present the points of law.

The jury having returned a verdict for the demandant, the tenant alleged exceptions.

G. Ashmun and N. T. Leonard, for the tenant.

W. G. Bates, for the demandant.

BIGELOW, J. The court are of opinion that these exceptions cannot be sustained.

1. The first objection taken to the ruling of the court below is, that the demandant was allowed to read his mortgage in evidence to the jury, after having proved its execution by one of the subscribing witnesses, without having called the other attesting witness, or shown any cause for omitting so to do. We do not understand that there is any inflexible rule of law, which requires that both of the subscribing witnesses to an instrument should be called and examined, in order to make legal proof of its execution. Ordinarily, it is sufficient if one is called and testifies to the due execution of the paper. 1 Greenl. Ev. § 569; 1 Phil. Ev. (4th Am. ed.) 465; *Russell v. Coffin*, 8 Pick. 150; *Jackson v. Gager*, 5 Cow. 385.

Undoubtedly there may be cases, where, on account of the failure of the recollection of one of the subscribing witnesses, or the appearance of fraud or forgery in the execution of the instrument, the court, in the exercise of its discretion, may hold the party to produce both the witnesses, or give satisfactory reasons for the absence of one of them; but whether this shall be done or not, depends on the circumstances of each particular case, and must be decided by the judge at the trial, in the exercise of a sound discretion, to which no exception can be taken. *Norris v. Freeman*, 3 Wils. 38.

But in the present case, there can be no ground for complaint by the tenant, on this point, because the other subscribing witness was called by the demandant during the trial for another purpose, and thus opportunity was given to the tenant to cross-examine him in regard to all the facts and circumstances bearing on the execution of the deed.

2. The next exception is, that the tenant was not allowed to cross-examine the subscribing witness, who was called solely to prove the tenant's signature, in regard to matters which tended to support the plea and specification of defence, until after the note and mortgage had been read in evidence. In this particular, we believe there has been some diversity of practice in the different courts of this commonwealth; the

more common usage having been to permit a party to cross-examine his adversary's witness, in relation to the entire case, although he was called only for formal proof. We are, however, inclined to the opinion, that the strict rule does not permit a party, who has not opened his own case, to introduce it to the jury by cross-examining the witnesses of the adverse party, but that, after having opened it, he is to call them again and cross-examine upon matters material to his case. 1 Greenl. Ev. § 447.

However this may be, it is discretionary with the judge presiding at the trial, to allow either course to be adopted, and his decision on the point is not subject to reversal here. Certainly, in the case at bar, the tenant could not have been prejudiced, as he was allowed to recall the witness, and to cross-examine him at great length, upon all the facts in the case.

3. We think the declarations and statements of De Wolf, made to the wife of the tenant, were inadmissible. They were not made in the presence of Miller or of Hazen, and could not bind them; nor were they so connected with the transaction in question as to form a part of the *res gesta*. Whether there was sufficient proof of a conspiracy or concert between De Wolf and Hazen, to make the declarations of one competent evidence to affect the other, we cannot determine. The whole of the evidence is not reported in the exceptions, and sufficient does not appear to enable us to pass on this question. The rule is well settled, that acts and declarations of one are competent evidence as affecting another, when it is first proved that both have been engaged in a common purpose and design. But in all such cases, a foundation must be first laid by evidence, sufficient, in the opinion of the judge presiding at the trial, to establish the concert between the parties, or proper to be laid before the jury as tending to prove such fact; and this rests in the discretion of the judge, to be exercised with the utmost caution, lest the jury may be led to infer the fact of a concert or conspiracy from the declarations of strangers. We presume that the tenant in this case had failed to show to the satisfaction of the court.

Decreet v. Burt.

that any concert or conspiracy existed between the witness and Hazen, and for that reason the declarations of the former were rightly rejected.

It follows, that the tenant could not be permitted to contradict De Wolf as to the declarations made to the wife of Miller, because, having on cross-examination drawn out his statement of a conversation upon a matter wholly collateral, he was bound to take his answers as he gave them, and could not be allowed to contradict them by independent evidence. *Underhill v. Agawam M. F. Ins. Co.* 6 Cush. 440; *Spenceley v. De Willett*, 7 East, 108. *Exceptions overruled.*

JOSEPH D. DECREET vs. AUGUSTINE BURT.

The holder of a promissory note, being a member of a firm who are the first indorsers thereon, cannot maintain an action on the note, against a subsequent indorser.

THIS was an action by the plaintiff, as indorsee, on a promissory note, signed by Francis G. Post. The name of the defendant was indorsed on the note, under the name of the firm of Decreet, Boyington & Company, of which the plaintiff was a member. At the trial in the court of common pleas before Byington, J., the plaintiff contended, that the defendant's name was first indorsed on the note, and that Decreet, Boyington & Company, subsequently indorsed the name of the firm over the name of the defendant. The defendant contended that the name of Decreet, Boyington & Company, was indorsed thereon before the defendant wrote his name on the note, and that the indorsements were made in the order in which they stood on the back of the note. The plaintiff also contended, that he was entitled to recover of the defendant as an indorser, whether the name of the firm of Decreet, Boyington & Company, was or was not indorsed before the indorsement by the defendant; but the judge ruled, that as the plaintiff was one of the firm of Decreet, Boyington & Com-

pany, he could not maintain this action; unless the defendant was the first indorser. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

W. G. Bates, for the plaintiff.

H. Morris, for the defendant.

DEWEY, J. The defendant is not liable, on his indorsement of this note, to an action by any prior indorser of the same. If Decreet, Boyington & Company were such prior indorsers, then clearly they could not maintain an action against the defendant, a subsequent indorser. The only further inquiry is, whether one of the firm might maintain such action. And as to this, we have no doubt. Decreet, the plaintiff, being a member of that firm, stood individually, as well as jointly, in the relation of a prior indorser, and so if the plaintiff could now recover of the defendant upon his indorsement, the defendant might recur to Decreet, Boyington & Company, as prior in liability. Such being the case, it is a good answer to a suit by one of the firm, that, as a member of such copartnership, he stood in the relation of a prior indorser.

Exceptions overruled.

ELIPHALET TRASK vs. JOHN MILLS.

A covenant to indemnify A. against all damages and costs which he may incur in consequence of indorsing any notes of B., past or prospective, relates only to indorsements made by A. for the accommodation and at the request of B., and does not extend to indorsements by A. of notes given him by B. for his own debts to him.

THIS was an action of covenant on the following instrument: "In consideration of one dollar, I hereby agree to indemnify and hold Eliphalet Trask harmless from all damages and costs which he may incur in consequence of indorsing any notes of Dean, Packard. & Mills, past or prospective. Witness my hand and seal, this 6th day of February, 1849. In presence of Isaac Mills. John Mills. [seal.]"

Trask v. Mills.

The case was submitted to the court upon an agreed statement of facts, the material part of which was as follows: At the date of this instrument, Dean, Packard & Mills were car-builders, extensively engaged in business in Springfield, and were the tenants of the plaintiff, with whom, from the commencement of their business in 1848, to their failure in May, 1850, they had mutual accounts, for work and labor done, and materials furnished to each other. During this period, Dean, Packard & Mills were in the habit of giving the plaintiff, from time to time, in payment of rent, and for any balance of account that might be found due to him, their notes of hand payable on time at some bank in Springfield, which the plaintiff indorsed and got discounted. When the notes became payable, some of them were paid by Dean, Packard & Mills, and others were renewed either for the whole sum, or for a part, and in one or two instances, for a larger sum. The substituted notes were signed by Dean, Packard & Mills, and indorsed by the plaintiff. The two notes set out in the plaintiff's writ, and which were the subject of his claim, were notes of this description, given partly for rent, partly for a balance of account, and partly for goods sold; and had been discounted by the plaintiff at the banks where they were payable, and the proceeds thereof received by him. When they became due, Dean, Packard & Mills had gone into insolvency, and the notes were taken up and paid by the plaintiff. The circumstances under which the indemnity was given, and attending the giving of the same, are not material to be stated. The plaintiff had not indorsed any accommodation paper for Dean, Packard & Mills, either before or after receiving the covenant of indemnity, on which this action was brought.

H. Vose, for the plaintiff.

W. G. Bates, for the defendant.

DEWEY, J. The object of this suit is the recovery from the defendant of the amount of two promissory notes of hand made by Dean, Packard & Mills to the plaintiff, and by him discounted at a bank, he indorsing the same, and thus becoming liable to the bank for the payment thereof. These notes were both given to the plaintiff by Dean, Packard & Mills, in

payment of rent due the plaintiff, and for articles of merchandise that were purchased of the plaintiff by the makers in the prosecution of their business as car-builders. The makers having failed before the maturity of the note, the plaintiff, as indorser, had been called upon to pay them, and had done so. He now seeks to recover the amount of these notes from the defendant, under the guaranty above recited.

The question is solely as to what is the true and proper construction of this instrument. That construction is to be given to it, which shall best accord with the intention of the parties as manifested by the instrument, looking at the situation of the parties, and the subject of the contract.

On the one side, it was contended that it is to have the extended application of an indemnity as to all notes that the plaintiff might choose to indorse, irrespective of any request of Dean, Packard & Mills, and would include an indorsement of the business notes of those parties given directly to the plaintiff, as payee. On the other hand, it is insisted that the sole purpose of this bond of indemnity was that of indemnifying the plaintiff against all losses that might arise by reason of the plaintiff's becoming an accommodation indorser for Dean, Packard & Mills, upon notes drawn by them for the purpose of obtaining loans at banks and elsewhere.

Taking this instrument in its most extended literal reading, it embraces all notes that the plaintiff should indorse. But this can hardly be supposed to have been within the intention of the parties, as this would have subjected the guarantor to an unlimited liability, extending to any note of Dean, Packard & Mills, in circulation at the time of their failure, if the plaintiff could be induced to indorse them, as he might very readily do, if he was fully indemnified by this instrument for all indorsements, irrespective of their being made at the request of Dean, Packard & Mills.

The case before us, it is true, does not require this extended application of this guaranty. But in considering whether it is to be taken to be a guaranty of all notes that the plaintiff might indorse, it is proper to look at the extent of the liability, as it would exist if the words of the guaranty were taken in their broadest literal terms.

Trask v. Mills.

Now it seems to us, that if the purpose had been to guaranty the debts of Dean, Packard & Mills to the plaintiff, created in their ordinary business transactions, for merchandise sold, or for rents of buildings, the promise to the plaintiff would have been direct to that effect. It would be in terms a guaranty of the debts of that firm due to the plaintiff. It certainly would be a novel and unnatural mode of guarantying the debts due to the plaintiff from Dean, Packard & Mills, to give the plaintiff a bond to indemnify him from all damages and costs which he might incur in consequence of indorsing any notes of Dean, Packard & Mills.

It would be a singular limitation or condition of liability as to such notes of the plaintiff, that the guaranty could not attach while the plaintiff held them, and could only be made effective by his indorsing them to some third person.

It seems to us that, from the nature of the instrument, and the course of business of these parties, the bond of indemnity had a limitation which must have been understood by both parties, namely, that it was to indemnify the plaintiff for any accommodation indorsement he might make for the firm of Dean, Packard & Mills, at their solicitation and request, and had no reference to the notes of said firm given to the plaintiff for their own proper debt, for the purchase of merchandise and ordinary business transactions.

He had asked no such guaranty, and it seems not adapted to such debts. It is true the language is that of indemnity for indorsing notes "past or prospective," and the case finds that there had been no previous accommodation indorsement by the plaintiff. This fact, however, may not have been known to the defendant, and the language may have been thus broadly stated in order to include all cases of accommodation indorsements for Dean, Packard & Mills.

We cannot avoid the conclusion, that this was intended by the parties as a guaranty of indemnity from the plaintiff, for accommodation indorsements, made by the plaintiff for that firm, at their solicitation, and was not designed to embrace the cases of notes given directly to the plaintiff as the real payee on a business note given to him for merchandise or rent.

Judgment for the defendant.

Hubbard v. Knous & another.

ASAHEL HUBBARD vs. SAMUEL KNOUS & another.

If the defendant, in an action of assumpsit, containing the common money counts, and also a count for the use and occupation of certain premises described, pays a part of the sum demanded into court, without specifying to which of the counts the payment is to be applied; such payment is an admission, only that the defendant owes the plaintiff, on some one or several of the counts, the sum so paid, but is not an admission of any particular contract or debt under any one of the counts, nor of a liability on all of them.

THIS was an action of assumpsit originally commenced on the 17th of January, 1849, returnable before a justice of the peace. The declaration contained the common money counts, and also a count for the use and occupation of a certain hall situate in Springfield, known as Hubbard's Hall, according to the account annexed to the writ, which was as follows: "Franklin Division, No. 28, To Asahel Hubbard, Dr. To Rent of Hall three months, from May 31 to August 31, 1848. \$12.50.

At the trial before the justice, on the 5th of February, 1849, the defendants pleaded the general issue, and specified in defence a tender made by Badger, one of the defendants, on the first day of the same February, of six dollars and fifty cents, which they brought into court for the plaintiff, and deposited in the hands of the justice, the plaintiff refusing to receive it. The justice gave judgment in favor of the plaintiff for the sum of twelve dollars and fifty cents, and costs; whereupon the defendant appealed to the court of common pleas.

The case was tried in the court of common pleas on the pleadings made up before the justice. The plaintiff offered in evidence, for the purpose of showing the amount of the rent, a lease from the plaintiff to the officers of the Franklin Division, No. 28, of the Sons of Temperance, and their successors in office. The defendant offered evidence, that just before the 1st of July, 1848, the plaintiff took possession of the hall, and continued in possession thereof in such a manner as to amount to an eviction of the lessees. To the admission of this evidence the plaintiff objected, contending that the only question open to the defendants upon the pleadings was the value of

the rent for the three months claimed in the bill of particulars, and that every thing else necessary to be shown by the plaintiff had been admitted by the defendant.

At this stage of the trial, the case was taken from the jury and submitted, upon the foregoing facts, to the court of common pleas, who gave judgment for the defendants; and the plaintiff appealed to this court.

W. G. Bates, for the plaintiff, cited *Jones v. Hoar*, 5 Pick. 285; *Huntington v. American Bank*, 6 Pick. 340; *Miller v. Williams*, 5 Esp. R. 19; *Bulwer v. Horne*, 4 B. & Ad. 132.

H. Morris, for the defendants, cited *Stafford v. Clark*, 2 Bing. 377; *Jones v. Hoar*, 5 Pick. 285; *Mellish v. Alnutt*, 2 M. & S. 106; *Rucker v. Pulsgrave*, 1 Taunt. 419; *Cox v. Parry*, 1 T. R. 464; *Blackburn v. Scholes*, 2 Campb. 341; *Long v. Greville*, 4 Dowl. & Ryl. 632; *Simpson v. Routh*, 2 B. & C. 682; *Seaton v. Benedict*, 5 Bing. 28; *Archer v. English*, 1 Man. & Gr. 873; *Spalding v. Vandercook*, 2 Wend. 431.

BIGELOW, J. The agreed statement of facts in this case presents a question as to the effect of the payment of money into court by the defendant. The plaintiff, at the trial, offered no evidence to sustain an action of assumpsit, or to prove any contract or liability on the part of the defendant, except that which was derived from such payment, and he relied upon it as a conclusive admission of the causes of action stated in the writ, and as leaving open only the question, whether he was entitled to recover any thing more than the amount brought into court.

There can be no doubt of the general proposition, that a payment of money into court does bind the party making it, to a certain extent, so that he cannot be permitted afterwards to contradict or control the admission thereby made. But a very material question arises, which is important to the decision of the present case, as to the nature and extent of this admission. In an action on a special contract, where a specific cause of action is set out in the declaration, to the proof of which the plaintiff would be strictly confined, a payment into court admits the contract, as alleged, and a breach thereof, with damages to the amount of the sum tendered. The

reason for this is obvious. There is in such a case only one contract set out in the declaration, and therefore the defendant, by paying money on that one specific contract, necessarily admits it. The payment can be applied to nothing else. But it is otherwise in actions of *indebitatus assumpsit*, where the declaration, as in the present case, contains the general money counts, which may include several causes of action. The defendant, in such cases, by payment of money into court, does not admit any specific contract; but only confesses, generally, a liability on some one or more of the causes of action set out in the writ, not exceeding the amount paid into court. It is not competent for a plaintiff to apply a general admission of this sort to any contract he may choose to set up under the money counts. The admission cannot be used at the pleasure of the plaintiff, but must be taken, if at all, in its precise legal import. If, therefore, the plaintiff claims to recover any further sum than that paid into court, he must prove a contract, express or implied, upon which the defendant is indebted to a greater amount.

To apply these principles to the case at bar: The defendant, by his payment, only admitted that he owed the plaintiff, on some one or several of the money counts, the sum so paid in by him, but he did not admit any particular contract or debt under any one of said counts, nor a liability on all of them. The payment was general, and so, therefore, was the admission. If the plaintiff sought to recover a further sum under the count for use and occupation, he was bound to show a contract, express or implied, on the part of the defendant, to pay rent. The defendant had admitted no such contract. He had only admitted some liability on some contract, to the amount brought into court. The burden was, therefore, on the plaintiff, if he claimed to recover a further sum, to prove a contract or liability to pay it. The defendant had the right to say, that his payment was not intended to apply to the count for use and occupation, and to require proof of such contract at the hands of the plaintiff. Without this evidence, the plaintiff had proved no contract on which the defendant was liable for any further sum.

We, therefore, understand the rule to be, that where a party pays money into court, on a declaration which sets out a special contract, he thereby admits the contract as alleged, and a breach thereof, with damages to the amount paid in. But where such payment is made in an action of *indebitatus assumpsit*, containing the money counts, the defendant thereby admits only some liability on some contract under the money counts, and if the plaintiff seeks to recover any further sum, he is bound to prove a contract or liability on the part of the defendant, as well as a larger sum due. We are aware that the case of *Jones v. Hoar*, 5 Pick. 285, seems to make no distinction between the effect of a payment into court upon a declaration containing a count upon a special contract, and upon one containing the money counts; but the point was not adverted to in that case, and was not material to its decision.

In the case of *Huntington v. American Bank*, 6 Pick. 340, the declaration did not contain the money counts generally, but set forth the same cause of action in two counts, and was decided on the ground, that the case was founded "on an express promise or special contract between the parties." The precise point involved in the present case was not there decided; and if some of the general expressions therein used do not accord with the principles herein laid down, we are satisfied that they are incorrect. Since that decision, the English authorities on this subject have been reviewed, and the point fully and ably discussed in the case of *Kingham v. Robins*, 5 Mees. & Welsb. 94, in which the court of Exchequer overruled some of the preceding decisions of the English courts, and affirmed the rule as hereinbefore stated; and that decision has been since repeatedly recognized. *Archer v. English*, 1 Man. & Gr. 873; *Stapleton v. Nowell*, 6 Mees. & Welsb. 9; *Story v. Finnis*, 6 Welsb. Hurlst. & Gord. 126. See also *Long v. Greville*, 4 Dowl. & Ryl. 632, and 3 B. & C. 10; *Seaton v. Benedict*, 5 Bing. 28.

The result is, therefore, that as the plaintiff in this case failed to offer any evidence to sustain his right to recover, in an action of assumpsit, any sum beyond that paid into court, judgment must be rendered for the defendant.

WHITMAN WALBRIDGE vs. WILLIAM A. SHAW.

If an action of replevin is dismissed for informality in the replevin bond, and judgment given for the defendant for a return, and the plaintiff returns the property to the place from whence he first took it, he may afterwards bring another action of replevin, for the same property, against the same defendant, although the defendant has not taken out a writ of return, nor actually received the property under the judgment in the first action.

THIS was an action of replevin for a yoke of oxen and a pair of cart-wheels, commenced on the 20th of June, 1849, and tried in the court of common pleas, before *Mellen, J.*

The defendant was a constable of the town of Wales, and took the property described in the writ on the 7th of May, 1849, upon an execution issued upon a judgment recovered against Ames Walbridge. Soon after the taking, the plaintiff brought an action of replevin against the defendant, upon which the property was redelivered to the plaintiff by the officer serving the writ. The action was entered in court at the June term, 1849, and was dismissed, on motion of the defendant, for defect and informality in the bond; and judgment rendered for the defendant, for a return of the property and for costs. In October, 1849, the defendant took out an execution against the plaintiff for costs, but never took out a writ of return. There was evidence of a return of the property by the plaintiff, to the place from which he had taken it by the first writ of replevin; and there was conflicting testimony, as to whether the defendant had in any way intermeddled with it after this return, or whether he had refused to receive it.

The judge instructed the jury, that the plaintiff might well maintain this action for the original taking, whether he had returned the property into the possession of the defendant or not; or whether the defendant, upon such a return, had intermeddled with it or not; or even if he had refused to receive it. Under this ruling, the jury returned a verdict for the plaintiff; and the defendant excepted.

H. Morris, for the defendant. The defendant is not liable to this action, because, at the time of its commencement, he

Walbridge v. Shaw.

had neither actual nor constructive possession of the property replevied, but the plaintiff himself had both. *Lathrop v. Cook*, 2 Shepl. 414; *Small v. Hutchins*, 1 Appl. 255; *Sawyer v. Huff*, 12 Shepl. 464; *Whitwell v. Wells*, 24 Pick. 25, 28; *Learned v. Bryant*, 13 Mass. 224; *Denny v. Willard*, 11 Pick. 526; *Fisher v. Bartlett*, 8 Greenl. 122; *Bursley v. Hamilton*, 15 Pick. 43.

R. A. Chapman, for the plaintiff. This action lies for the original unlawful taking. Rev. Sts. c. 113, § 27. It is not barred by the first action, nor by any proceedings therein, as that was not decided on the merits. *Wilbur v. Gilmore*, 21 Pick. 250. If this action does not lie, the plaintiff will lose his property without remedy, as the defendant's judgment for a return is in force against him.

Dewey, J. The plaintiff may well maintain this action upon the original unlawful taking by the defendant. It is no valid objection, that the plaintiff had instituted a previous action of replevin for the same goods, for the facts show that the case was dismissed on motion of the defendant for an informality in the same, and thereupon judgment was rendered for a return of the property to the defendant. That judgment constitutes no bar to this action, because the case was not heard on its merits, but was dismissed for error in the form of the proceedings. Nor does it form a valid objection, that the defendant had not in fact taken out any writ of return, or actually received the property into his custody under that judgment. The judgment for a return was ordered upon the motion to dismiss the writ, and the plaintiff yielded to it, and returned the property to the place from which he had taken the same under his defective proceedings. This left the plaintiff's case as it was when he instituted his first action. The order for return was no bar, as it was founded upon a dismissal of the action for errors in form. The plaintiff's possession was no longer a lawful one under the first writ, and he thereupon properly instituted a new action, grounded upon the original illegal taking by the defendant. This action may be therefore maintained.

Exceptions overruled.

GEORGE W. STETSON vs. ELI W. PACKER & others.

A warrant, issued by a justice of the peace, after *St.* 1850, c. 314, took effect, directing the officer to bring the defendant "before A., or some other justice of the peace within and for the county," (A. being a trial justice, as well as a justice of the peace,) authorizes the officer to arrest the defendant and take him before A., as a trial justice, but not before any other trial justice; and if the officer arrests the party to take him before A., not finding whom, he, without taking his prisoner before any other justice of the peace, takes him before another trial justice, the officer and his assistants, but not the magistrate who issued the warrant, will be liable in trespass to the party arrested.

THIS was an action of trespass for an assault and battery and false imprisonment, and was tried in the court of common pleas. The defendants relied on the following facts as a defence to the action: On the 14th of July, 1850, a complaint was made before the defendant Packer, against the plaintiff, Stetson, for burning a school-house in Leyden; Packer being a justice of the peace, but not a trial justice, within and for the county of Franklin. Upon this complaint, Packer, as justice of the peace, issued a warrant, commanding Stetson to be brought "before David Aiken, Esquire, of Greenfield, or some other justice of the peace, within and for said county, to answer to the same," &c. On the same day, Stetson was arrested under this warrant by the defendant Nash, with the assistance of the defendants Budington and Miller, and taken to the jail in Greenfield, and there detained till the next day, when, David Aiken being absent from the town, Stetson was brought before Daniel Frost, of Orange, a trial justice within and for said county; and a *nolle prosequi* was then entered by the counsel for the government. At the time of the issuing of the warrant, and of the arrest and imprisonment of the plaintiff, David Aiken was a justice of the peace, and also a trial justice, within and for the county of Franklin. Upon these facts, the jury, by the instructions of Wells, C. J., who presided at the trial, returned a verdict for the defendants; and the plaintiff alleged exceptions.

W. Griswold, for the plaintiff. The warrant is no protection to the magistrate, unless he had jurisdiction of the sub-

ject matter, the person and the process. *Fisher v. Shattuck*, 17 Pick. 252; *Grumon v. Raymond*, 1 Conn. 40; *Tracy v. Williams*, 4 Conn. 107; *Allen v. Gray*, 11 Conn. 95; *St.* 1850, c. 314, § 4. To justify the officer and his assistants, the precept must show jurisdiction in the court issuing it, must be lawful on its face; must be regular and in due and legal form. *Sanford v. Nichols*, 13 Mass. 286; *Savacool v. Boughton*, 5 Wend. 170; *Toof v. Bentley*, 5 Wend. 276; *Wilmarth v. Burt*, 7 Met. 257; *Donahoe v. Shed*, 8 Met. 326; *Commonwealth v. Foster*, 1 Mass. 488. The officer did not obey his precept, and therefore he is liable.

G. Allen, (with whom was *G. T. Davis*), for the defendants. 1. Persons called upon by an officer, to assist him in serving any process, are justified in so doing, even though the process is irregular and voidable. 2. An officer is justified in executing a warrant, granted by one having a general jurisdiction over the subject matter, though irregular and voidable, and though erroneously or corruptly granted in the particular case. *Rev. Sts. c. 85, § 30*; *Nichols v. Thomas*, 4 Mass. 232, 234; *Sanford v. Nichols*, 13 Mass. 288; *Case of the Marshalsea*, 10 Co. 76, a. See also *Clark v. May*, 11 Mass. 233; *Adams v. Robinson*, 1 Pick. 461. 3. The erroneous direction in the warrant never having been acted upon, but all the proceedings under the warrant having been regular and legal, it did not vitiate the entire warrant. *Hearsey v. Bradbury*, 9 Mass. 95; *Campbell v. Stiles*, 9 Mass. 217; *Wood v. Ross*, 11 Mass. 276; *Brier v. Woodbury*, 1 Pick. 366; *King v. Whitcomb*, 1 Met. 328; *Barnard v. Graves*, 13 Met. 85; *Commonwealth v. Parker*, 2 Pick. 550; *Ex parte Coley*, 2 Eng. Law & Eq. R. 282; *McCall v. Parker*, 13 Met. 374. 4. A magistrate is not liable to an action for a mistake in a warrant, if he had a right to issue the warrant. *Rev. Sts. c. 135, §§ 1, 2*; 1 Chit. Crim. Law, 25, 32; *Harper v. Carr*, 7 T. R. 274; *Butler v. Potter*, 17 Johns. 145; *Barton v. Bricknell*, 13 Ad. & El. N. R. 398; *Chickering v. Robinson*, 3 Cush. 543. 5. If the plaintiff has any remedy, it is by a special action on the case for malfeasance in office. *Dillingham v. Snow*, 5 Mass. 559.

The opinion was delivered at September term, 1852.

DEWEY, J. By the provisions of *St.* 1850, c. 314, the jurisdiction of justices of the peace, in the examination and trial of persons charged with criminal offences, was taken away, and the same was transferred to certain new officers, called trial justices, leaving to justices of the peace only the authority to receive complaints and issue warrants for the apprehension of alleged criminal offenders, returnable before any of the trial justices of the same county.

After the passage of this act, therefore, the issuing of a warrant by a justice of the peace, directing an arrest of an individual upon a criminal charge, and that the party be taken before a justice of the peace for examination or trial, would be an act unauthorized by law; and the process would, upon the face of it, show such want of jurisdiction as to the process, that if, in execution thereof, the party was actually arrested and held for trial before a justice of the peace, the officer thus arresting the party and holding him for trial, as well as the magistrate who issued such warrant, would be liable therefor in an action of trespass.

To some extent, a distinction exists as to the liability of the magistrate who issues the warrant, and the officer who executes it. But when the want of jurisdiction is apparent on the face of the warrant, the officer who serves the same is a wrong doer.

In the present case, however, the warrant was made returnable before David Aiken, or some other justice of the peace of said county. Being made returnable before David Aiken, it is to be taken, that it was to be heard and tried by him in his legal capacity to act thereon as a trial justice; he holding that office. Had this warrant been in fact returned before David Aiken, and the party brought to trial before him, the case would have fallen within the principle settled in *Commonwealth v. Henry*, ante, 512. In that case, upon a similar warrant, returnable before James W. Crooks, or some other justice of the peace, the warrant having been in fact returned before James W. Crooks, who was a trial justice, it was held, that jurisdiction in the case was properly taken by Mr. Crooks; and the further order, as to taking the party before some other

justice of the peace, not having been acted upon, the proceedings were sustained.

In the case now before us, the party was arrested with the purpose of taking him before Mr. Aiken; but, on account of his absence and inability to hear the case, the warrant was in fact returned before Daniel Frost, another trial justice; and the party was brought before him; and this latter proceeding raises a further question, not decided in *Commonwealth v. Henry*. That adjudication embraces the present case, in all its proceedings anterior to the return of the warrant before Mr. Frost. It shows that the warrant, although informal to some extent, yet authorized the officer to arrest the party, and take him before Mr. Aiken, as required by the warrant. The further direction, to take him before "some other justice of peace," if not acted upon, would furnish no ground of complaint, either against the magistrate, or against the officer who served the process.

This view of the case furnishes a justification as to Packer, the magistrate who issued the warrant, as it was a competent warrant to arrest the party and bring him before David Aiken, and there was no execution of the further order to take him before some other justice of the peace. Had that part of the warrant been executed, the magistrate issuing the same would have been responsible. There was no direction in the warrant to bring the party arrested before Daniel Frost, and Packer therefore is not answerable for such use of the warrant. Had it been thus directed, the whole proceeding would have been right. The omission raises the question of the liability of those executing the process.

As to those who were assistants of the constable in the service of this process, as it was legal to arrest the plaintiff and take him before David Aiken, those who only aided in that duty were well authorized so to do. If they did nothing further than this; if they were not participators in the taking of the plaintiff before Mr. Frost, and only acted as assistants in the arrest, for the purpose of taking the party before Mr. Aiken, they were justifiable in so doing, under the warrant from Packer.

The further question, and that in which this case materially differs from that of *Commonwealth v. Henry*, is the taking of the party before Daniel Frost for trial. This affects those only of the defendants who acted in that matter. Giving the most liberal effect to the authority conferred by this warrant, it could only justify the constable in taking the party for trial before Mr. Aiken. There was a direction to the officer to bring the party before Mr. Aiken; but there was no further direction, to take him before any other trial justice, or before any other individual named, who was in fact a trial justice. To sustain this part of the defence, would require us to hold, that this warrant authorized the constable to bring the party before any and every trial justice for the county of Franklin, as fully as though thus stated therein. It seems to us that no such authority was given by this warrant. The name of Daniel Frost was not inserted in the warrant; nor was there any direction to bring the party before any other trial justice than David Aiken. This warrant could, therefore, be only properly executed by taking the party arrested before Mr. Aiken. Any act, done by the constable or his assistants, in forcibly taking the party before Daniel Frost, was unauthorized, and in violation of the rights of the plaintiff, and would subject the officer and his assistants to an action of trespass therefor. As we have already suggested, such taking the party before Daniel Frost, a trial justice, would not charge Packer, the justice who issued this warrant, if he did nothing further than to issue the warrant in the case. But as to the constable, and any assistants acting in coöperation with him, in taking the plaintiff before Daniel Frost, the warrant was no sufficient justification. The result must be, therefore, that the verdict must be set aside, and a new trial had.

•

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF WORCESTER, SEPTEMBER TERM 1851,
AT WORCESTER.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. THERON METCALF,
HON. RICHARD FLETCHER, } **JUSTICES.**
HON. GEORGE T. BIGELOW,

ASA W. CLARK vs. HARVEY TAINTER.

C. by his last will appointed T. his sole executor, and authorized him to sell and convey such of C.'s property, as in T.'s judgment would promote the interest of all concerned, to raise a certain amount for the payment of debts and of certain legacies; and devised and bequeathed the residue of his property, subject to the rights and directions given to his executor, and subject to the payment of his debts: T. declined to act as executor, and an administrator of the estate of C. with the will annexed, was appointed: T. afterwards accepted the office of trustee under the will. It was held, that T. did not, by renouncing the office of executor, lose the power to sell as trustee under the will, and that sales and conveyances so made by him, after his acceptance of the trust, were valid as against C.'s residuary devisees and their heirs.

THIS was a writ of entry, brought on the 29th of June, 1849, to recover one undivided eleventh part of a tract of

Clark v. Tainter.

land in Leicester, being the same premises in controversy in the action between the same parties reported in 13 Met. 220. The tenant pleaded the general issue; and the case was submitted to the court upon the following statement of facts:

Ephraim Copeland died on the 3d of March, 1842. His last will,* which was duly proved and allowed on the first Tuesday of August, 1842, contained the following clause: "I hereby nominate and appoint Captain Jonas Tucker, of Charlton, to be the sole executor of this my last will and testament, and hereby authorize and fully empower him to sell and convey such of my property, as in his judgment will best promote the interest of all concerned, to raise the two thousand dollars for the use of my wife and daughter, and to pay my just debts."

On the 4th of April, 1842, Tucker declined the office of executor, in these words: "I, the subscriber, having been named as executor, in the last will and testament of Ephraim Copeland, late of Leicester, in said county, deceased, do hereby decline that trust. Jonas Tucker." On the 7th of February, 1843, Ebenezer Dunbar, a creditor of the estate, was appointed administrator, with the will annexed; and afterwards, under a supposed power in the will, assumed to sell the demanded premises at public auction, and to convey the same to the demandant, who entered into possession under the deed so given. This court, at the October term, 1848, upon a writ of entry to recover the premises, brought by the present tenant against the present demandant, held this deed to be void for want of authority in Dunbar to sell; and on the 11th of October, 1848, rendered judgment accordingly in favor of the present tenant, then demandant. 13 Met. 220.

On the 20th of December, 1848, Tucker accepted, in writing, the office of trustee under the will, and gave bond for the faithful performance of the duties of that trust. Afterwards, without public notice, or any notice to the residuary devisees, he sold the demanded premises, and on the 30th of said December,

* The important parts of this will are fully set forth in the report of the case of *Tainter v. Clark*, 13 Met. 220, 221.

Clark v. Tainter

executed a deed of the same to the demandant, who was then in possession thereof under his deed from Dunbar. The material part of this deed was as follows: "Know all men by these presents, that I, Jonas Tucker, of Charlton, in the county of Worcester, yeoman, trustee under the last will and testament of Ephraim Copeland, late of Leicester, in said county, deceased; which has been duly proved, approved and allowed; being authorized by said will to sell and convey such of the property of said deceased as therein expressed as in my judgment would most promote the interest of all concerned, to raise the two thousand dollars of legacies, and to pay his just debts, as set forth in said will, in consideration of thirteen hundred and fifty eight dollars and forty eight cents to me paid by Asa W. Clark, of said Leicester, yeoman, the receipt whereof is hereby acknowledged by virtue and in pursuance of said authority, do hereby give, grant, sell and convey to the said Asa W. Clark, his heirs and assigns, the following described parcel of real estate." [Then followed the description.] "Being the same premises which are described in what purports to be a deed from Ebenezer Dunbar, administrator, to said Clark, dated October 18, 1843, recorded," &c., "to which reference may be had for a description." On the 10th day of April, 1849, Tainter took possession of the premises under a levy of an execution issued on the judgment rendered in his favor in October, 1848.

The parties agreed that, upon the foregoing facts, judgment should be entered, on nonsuit or default, as the court should determine; reserving the, question of rents and profits to be determined by a jury, unless the parties should agree thereon.

P. C. Bacon, for the demandant.

L. Williams and *J. H. Mathews*, for the tenant.

In this and the two following cases, argued at a former term, opinions were now read, as drawn up by

DEWEY, J. The demandant claims the premises in controversy under a deed from Jonas Tucker, acting under a supposed authority, derived from the last will of Ephraim Copeland. The validity of this deed is the subject of the present inquiry.

Clark v. Tainter.

Although under another form, yet the construction of that clause in the will, giving Tucker a power to make sale of the lands of Copeland, was much considered in the case between these parties, in 13 Met. 220. The title then set out by Clark was a conveyance by a deed from Dunbar, the administrator, who claimed to have the power of sale of the lands, as successor in the administration, and that, as such administrator, he might lawfully sell the same for the payment of debts and legacies, without any order for such sale from the court of probate, or this court. The former case, it is true, required no farther decision than that Dunbar had no power, under the will, to make sale of the lands for the purposes for which Tucker was authorized to sell them. But the decision of that point involved, to a great extent, the farther question of the authority of Tucker to make such sale, although he had renounced the executorship. Indeed one of the strong grounds, set forth in the opinion of the court, as a reason why Dunbar could not sell under the will, was based upon the direct assumption of the continuance of the power in Tucker to make such sale and conveyance, as trustee under the will, after he had renounced the executorship.

Subsequently to this decision, and, as we may suppose, acting in reference to it, Tucker assumed the trust under the will, gave bond as such trustee, and proceeded to make sale of the lands for the purposes stated in the will. Clark became a purchaser of that portion of the land which is demanded in the present suit, and received from Tucker a good title, if it was competent for Tucker to give one. Upon this title Clark now relies, and, for the purpose of sustaining it, he refers us to the opinion and views of this court, as expressed in the former case between himself and Tainter; and especially to that part affirming that the power of sale still continued in Tucker, notwithstanding he had declined the executorship. In that case, in assigning the reasons why the power to make sale of the lands did not vest in Dunbar, on his appointment as administrator, it was said by the court, in the opinion pronounced: "Tucker, the donee of the power, has never renounced it, and the consequent trust; and we are

Clark v. Tainter.

not aware of any impediment to his executing it;" and again: "It is clear he was both trustee and executor, under the will, and the power to sell, being coupled with a trust, has not been relinquished." These positions, thus stated, are expounded and enforced in an argument by the learned judge. This language fully recognizes the power of Tucker to sell the lands, as a continuing power, and one that he might lawfully exercise; and had it come from the court in another form, as for instance in answer to the petition from Tucker, asking the direction of the court as to his power and duties, it would be at once held conclusive. Although not given in that form, yet it was an opinion of this court, giving a construction to this will in reference to the power of sale given to Tucker, and the effect of his renouncing the executorship, upon that power.

As it seems to us, the view taken in the former case must now be held to be the law applicable to the power of Tucker to sell. In the former case, the title of Clark was that of a *bona fide* purchaser from an administrator acting, as he supposed, under authority vested in him by the will, but, as the court held, under an erroneous view of his authority. The court assigned two reasons for this opinion. 1st. That the power to sell, conferred on Tucker, was a personal confidence, and so not transmissible to Danbar. 2d. That the power vested in Tucker was not annulled by his renunciation of the executorship, inasmuch as he was also a trustee, and so the power to sell remained in full force.

The tenant, Tainter, relies upon this opinion for one purpose, viz., to show that the demandant has no valid title under the administrator's deed, and that the power of sale, vested in Tucker, was not one that would pass to an administrator with the will annexed; but at the same time he would repudiate the second ground assumed by the court as a reason for rejecting this title through the administrator, viz., that Tucker had never renounced the power of sale, and that he might still exercise it.

Considering that the case of *Tainter v. Clark* was so very recently decided, and that it was a question of the construction of this will, that it was deemed proper by the court to con-

sider, as a branch of the inquiry, the question of the continuance of the power in Tucker to sell, and to express an opinion favorable to such power, and that, under that opinion, he has assumed to exercise it, and made various sales, we think the question must now be considered as settled, and that it was competent to the plaintiff to acquire a good title as against the residuary devisees of Ephraim Copeland, by a deed from Tucker acting under the authority vested in him by the will of Ephraim Copeland.

We have not overlooked the concluding paragraph, in the opinion referred to, as to the proper remedy for the administrator, added by way of caution to the parties as to the course to be pursued; and although its language would admit of the construction that the court intended to express no opinion as to the power of Tucker to convey, if he voluntarily assumed to act as trustee, and to sell under the power, yet we apprehend that the remark was made rather with reference to the other modes named, of remedying the evil arising from the invalidity of the sale by the administrator, inasmuch as upon the question of the power still remaining in Tucker to sell, the court had expressed an opinion, and had assigned that as a good and sufficient reason for denying the authority of the administrator to sell, under the power in the will.

It is to be observed that this is an action against one who claims to hold the land as heir at law to a devisee under this will. As to such persons the deviser has the full right to dispose of his estate in such manner and under such incumbrances, as to trusts and powers to sell, as he may deem expedient. This case raises no question of the rights of the creditors of an insolvent estate. Nor is there any conflict between an administrator with the will annexed, who has, under a license from the court, made sale of the estate to pay debts and legacies, and a trustee clothed by the testator with power to sell. The administrator has made no such application for leave to sell, and no conflict arises, except with the heirs at law of the devisees.

The result is that the demandant, having acquired a good title by the deed of Tucker, is entitled to maintain this action.

Judgment for the demandant.

**HARVEY TAINTER & others vs. EDWARD H. HEMENWAY
& others.**

A testator devised land, subject to a right which he gave to a trustee to sell and convey any of the same at his discretion for the payment of certain legacies and debts: The devisee brought a writ of entry to recover the land, against one having no title. It was held, that a sale and conveyance duly made by the trustee to the tenant, pending this action, was no bar to the demandant's recovery.

THIS was a writ of entry brought on the 19th of September, 1848, to recover three undivided eleventh parts of certain lands in Leicester. The defendants pleaded the general issue, and specified in defence a paramount title acquired since the commencement of the action.

The case was submitted to the court upon an agreed statement, embracing the following facts: At the time of bringing this action, the tenants were in the actual possession of the demanded premises, as disseisors of the demandants, who were residuary devisees of Ephraim Copeland. The appointment, by Copeland in his will, of Jonas Tucker as executor thereof and trustee under the same, Tucker's renunciation of the office of executor, the appointment of Dunbar as administrator, and Tucker's acceptance of the office of trustee, were agreed as stated in the next preceding case of *Clark v. Tainter*. On the third of January, 1848, Dunbar, after public notice, undertook to sell at public auction and to convey to the tenants the demanded premises. On the 30th of December, 1848, Tucker, as trustee as aforesaid, without any public notice, or any notice to the demandants, sold the demanded premises, and executed a deed thereof, to the tenants, for a consideration equal to that obtained by Dunbar, adding interest. It was agreed that a judgment should be entered on nonsuit or default, according to the opinion of the court upon the foregoing facts; saving the question of costs.

L. Williams and *J. H. Mathews*, for the demandants.

I. M. Barton and *P. C. Bacon*, for the tenants.

DEWEY, J. In this case, judgment must be rendered upon the state of the title as it was at the date of the writ. At that time, the tenants had no other conveyance than the deed from

Dunbar v. Tainter & others.

Ebenezer Dunbar, the administrator, with the will annexed, of Ephraim Copeland. That title is invalid, for the reasons assigned in *Tainter v. Clark*, 13 Met. 220. The title, subsequently acquired by the tenants by a conveyance from Jonas Tucker, although a good title, as is now held in the case of *Clark v. Tainter*, decided at the present term, (*ante*, 567,) is no sufficient answer to the present action. *Hall v. Bell*, 6 Met. 431. The result is, that the tenants must be defaulted; and if the demandants assert a title under this judgment, the tenants will resort to a new action under their newly acquired title. The present judgment will be no bar to such an action.

Judgment for the demandants.



EBENEZER DUNBAR vs. HARVEY TAINTER & others.

A testator devised land to his executor T. in trust to sell such part thereof as in T.'s judgment would promote the interest of all concerned, for the payment of certain legacies and debts; T. declined to act as executor; an administrator with the will annexed was appointed, and, acting under the mistaken supposition that he was authorized by the will to sell, sold the land, and charged himself with the purchase money in his probate account; T. afterwards accepted the office of trustee under the will, and sold the land to the same purchaser for a sum equal to the consideration received by the administrator, adding interest from the date of that sale. It was held, that the administrator was entitled to be credited in his probate accounts with the sum with which he had so charged himself, and with any interest which had accrued to the estate on such sum.

THIS was an appeal from a decree of the probate court, disallowing certain items in the third account of the appellant as administrator with the will annexed of Ephraim Copeland; and was submitted to this court upon the following statement of facts:

Ephraim Copeland by his last will, duly proved in August, 1842, appointed Jonas Tucker sole executor of the same, and gave said Tucker power to sell real estate for certain purposes expressed in the will. See *ante*, 568. Tucker declined the office of executor, and the appellant was thereupon appointed administrator with the will annexed of Copeland's estate, gave

Dunbar v. Tainter & others.

bond as such, and published notice of his appointment. In the fall of 1843 and spring of 1844, the appellant, in pursuance of the supposed authority contained in the will, sold at public auction, after proper notice, for the purposes mentioned in the will, all the real estate of the testator, not specifically devised, and received the purchase money, amounting to the sum of \$5327.54, as appears by the considerations expressed in the deeds, and by the items with which he charged himself in his first and second accounts. This court, at October term, 1848, upon a writ of entry brought by one of the residuary devisees of Copeland against a grantee under one of these deeds from the appellant, held the deed void for want of authority in Dunbar to give it. *Clark v. Tainter*, 13 Met. 220. Jonas Tucker, on the 20th of December, 1848, accepted the office of trustee under the will, and gave bond accordingly; and on the 30th of the same month, sold at private sale, and conveyed, the same several lots of land, to the same persons who had purchased of Dunbar, and in consideration of the same sums, adding the lawful interest from the time of the sale by Dunbar to the time of the sale by Tucker. At the time of Tucker's sale, the residuary devisees and their heirs had made no conveyance or partition of their interest in the real estate; and the lots were in possession of Dunbar's grantees or of those claiming under them. On the 20th of February, 1849, Tucker filed, in the probate office, an account under oath of his sales as trustee, showing the sum of \$6950.25, which amount he holds for the payment of the two one thousand dollars legacies, under Copeland's will, and interest thereon, and of the just debts of said Copeland.

The appellant claimed to be allowed the amount of the sales made by him and credited to the estate upon the settlement of his first and second accounts, and also claimed interest on the items so credited from the time of making those sales to the settlement of his account. The account is to be stated and settled as the court shall direct.

I. M. Barton, for the appellant.

J. H. Mathews, for the appellee.

DEWEY, J. The claim of the administrator, Dunbar, to the

 Barnes v. Harris.

reimbursement of all sums credited by him to the estate of Ephraim Copeland, as avails of land sold by said Dunbar, is entirely reasonable and proper; those conveyances having been declared invalid, and no estate having passed thereby. *Sherman v. Atkins*, 4 Pick. 283. As to his claim for interest on said sums, so far as the same can be allowed without any prejudice to the estate of Copeland beyond the loss of interest accrued upon moneys derived from those sales, that would seem reasonable. In other words; if the account of Dunbar is so corrected and stated, that the estate of Copeland shall not be affected by reason of such sales, treating them as though nothing of the kind had taken place, that mode of stating the account should be adopted. But the court do not deem it expedient, at this time, to make any final decree as to this account. After Tucker shall have paid over to Dunbar the balance in his hands, payable to the administrator; Dunbar may state a new account.

SEWALL P. BARNES vs. REUBEN HARRIS.

Where a person goes to the office of an attorney at law, to obtain professional advice, and there consults with a student at law in the office, the communications, made by him to the student in the course of such consultation, are not protected from disclosure in court, even if he supposes the student to be an attorney.

THIS was an action of assumpsit on an account annexed to the writ. At the trial in the court of common pleas; before *Howe*, J., the defendant called Stephen Holman, as a witness, and proposed to inquire of him as to a conversation between him and the plaintiff, which took place in the office of Milton Whitney, Esq., an attorney of this court, before the commencement of the suit. The witness having stated, that at the time of the conversation, he was a student at law in Whitney's office; that the plaintiff called there for professional advice; that he did not know but the plaintiff supposed him

Barnes v. Harris.

to be Mr. Whitney; and that the conversation was relative to the plaintiff's claims against the defendant, as to which the plaintiff consulted the witness; the judge ruled, that it was not competent for the witness to testify as to any statements then made to him by the plaintiff, for the purpose of obtaining professional advice. Whitney was not present at the conversation; he was not the attorney of the plaintiff in this suit; and it did not appear that the plaintiff had ever before consulted him. The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

F. H. Dewey, for the defendant.

N. Wood, for the plaintiff.

The opinion was delivered at October term, 1852.

METCALF, J. The testimony of the witness was excluded, probably, either on the ground that he was a student in an attorney's office, and therefore the communication made to him by the plaintiff was privileged, as if made to the attorney himself, or on the ground that the plaintiff supposed that the witness was an attorney at law. But, in our judgment, the testimony ought not to have been excluded on any ground.

It is to be remembered, whenever a question of this kind arises, that communications to attorneys and counsel are not protected from disclosure in court for the reason that they are made confidentially; for no such protection is given to confidential communications made to members of other professions. The principle of the rule, which applies to attorneys and counsel, (says the chief justice, in 14 Pick. 422,) is, "that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that

on such facts the mouth of the attorney shall be forever sealed." And Lord Brougham says, (1 Mylne & Keen, 103,) the rule is established "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources." See also *Russell v. Jackson*, 9 Hare, 387; 1 Macnally on Ev. 239, 240; Glassford on Ev. 482, 483; 4 Munf. 287.

Such being the reason of the rule which protects communications made to attorneys and counsel, the court should apply the rule to those cases only which fall within that reason. And it is truly said, in *Harrison on Ev.* 36, that as the rule operates to the exclusion of evidence, the courts have always felt inclined to construe it strictly and narrow its effect. We believe the rule is correctly stated in *Foster v. Hall*, 12 Pick. 93; viz. that it "is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks." See also 1 Phil. Ev. (Amer. ed. of 1849,) 163; 1 Greenl. Ev. § 239.

The witness, in this case, was not of the legal profession; and though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose. Many students at law are never either the one or the other. Some of the members of this court never were.

If the plaintiff's communication was made to the witness in his capacity as a student in Mr. Whitney's office, it is not privileged; *Andrews v. Solomon*, Peters C. C. 356; nor if it was made on the supposition that the witness was Mr. Whitney or some other attorney at law. *Fountain v. Young*, 6 Esp. R. 113; 2 Stark. Ev. (4th Amer. ed.) 396; 1 Greenl. Ev. § 241.

New trial ordered.

DANIEL BACON vs. JOSEPH ROBINSON.

In an action on a promissory note payable to an executor, the defendant is not a competent witness, under Rev. Sts. c. 35, § 4, to prove that the consideration of the note was usurious interest taken and reserved of him by the payee's testator; although the payee was cognizant, of his own knowledge, of the nature of the usurious transaction, at the time it took place.

THIS was an action of assumpsit on the following note: "On reckoning with F. A. Brooks this day of accounts, after deducting for five cows and one horse he had of me, there is due F. A. Brooks as executor of A. Brooks, Jr., five hundred and twenty three dollars and forty four cents, payable to himself or order on demand, with interest. This is given in exchange for memorandum to him of February 7, 1846, of \$690.57. July 23, 1847. Joseph Robinson." This note was indorsed in blank by F. A. Brooks.

At the trial in the court of common pleas, before Hoar, J., the defence relied on was, that the consideration; if any, of this note, was usurious interest taken and reserved by Aaron Brooks, Jr., in a transaction between him and the defendant; and for the purpose of proving the defence, the defendant offered himself as a witness. He also offered to prove, by his own testimony, that F. A. Brooks was cognizant, of his own knowledge, of the nature of the transaction, out of which the usury was alleged to have arisen, at the time it took place. But the judge rejected the evidence, and the plaintiff thereupon obtaining a verdict, the defendant excepted.

G. F. Farley and *E. Washburn*, for the defendant.

B. F. Thomas, for the plaintiff.

METCALF, J. The defendant, in support of these exceptions, relies on two propositions; *first*, that if the action on the note in suit had been brought by the promisee, the defendant would have been a competent witness, by virtue of the Rev. Sts. c. 35, § 4; and *secondly*, that as the action is brought by the indorsee of a note payable on demand, the defendant is a competent witness, by virtue of Sts. 1839, c. 121, and 1845, c. 68.

We have not considered the second proposition; because

we are of opinion that the first, on which it depends, cannot be maintained.

The Rev. Sts. c. 35, § 4, provide that "in the trial of any action wherein it shall appear by the pleadings that the fact of unlawful interest having been taken or reserved is put in issue, it shall be lawful for the debtor (the creditor being living) to become a witness, and he shall be admitted as such; and the creditor, if he shall offer his testimony, shall also be admitted as a witness," &c. What is here meant by the words "debtor" and "creditor?" The case turns on the answer to this question. And on examining the previous statutes and decisions upon this matter, only one answer can be given. There were four previous statutes, namely, Sts. 23 Geo. 2, (Anc. Chart. 573); 1783, c. 55; 1825, c. 143, and 1826, c. 27. In all of them, as in Rev. Sts. c. 35, the "debtor" is made a witness, on condition that the "creditor" is alive; and in all of them, the words "debtor" and "creditor" undoubtedly had the same meaning. Now we have a judicial decision as to the meaning of these words in St. 1783, c. 55, § 2. In *Binney v. Merchant*, 6 Mass. 193, Sewall, J., gave the following opinion: "This statute mode of trial, extraordinary in itself, and in derogation of the common law, is to be permitted in the particular case only, for which the legislature have provided; that is, in a suit between the creditor and debtor; which has always been understood to mean the original creditor and debtor in the contract. They must be parties to the action; and in the nature of the thing they only can attest to the circumstances, from which the controversy is supposed to arise, and to which the oath to be tendered, and to be taken by one or both of them, refers." See also *Putnam v. Churchill*, 4 Mass. 516. *

The same meaning that was given to the words "creditor" and "debtor" in the St. of 1783, must be given to them in the Rev. Sts. c. 35, on which the defendant relies. And this is conclusive against these exceptions. The usury is not alleged to have been taken or reserved by the promisee, but by his testator. So that if the promisee had brought the action in his own name, the defendant could not have been admitted as a witness.

Exceptions overruled.

EDWIN BACON vs. THE INHABITANTS OF CHARLTON.

A tender, under Rev. Sts. c. 25, § 23, of a certain sum in full of damages sustained in consequence of a defect in a highway, has the effect and operation of a tender at common law; and where the declaration contains only one cause of action, specifically set forth, the tender is a conclusive admission of every fact, which the plaintiff would otherwise be bound to prove, in order to maintain his action, and precludes the defendant from introducing evidence of carelessness on the part of the plaintiff, either as to the merits of the case, or in mitigation of damages.

In an action against a town for an injury sustained by reason of a defect in a highway, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible in evidence for the plaintiff.

THIS was an action on the case to recover damages for an injury sustained by the plaintiff, in being thrown from his carriage, while travelling through the town of Charlton, in consequence of an obstruction in the highway. Before this action was brought, the defendants tendered the plaintiff \$245 in full for his damages, and upon the return day of the writ paid the same into court.

At the trial in the court of common pleas, *Hoar*, J., ruled that the tender admitted the plaintiff's cause of action and all that was necessary for him to prove in order to sustain it; that the only question open was the amount of damages, and that the defendants could not argue to the jury in mitigation of damages, that the plaintiff had been guilty of any carelessness on his part.

The presiding judge also ruled that groans or exclamations of pain, made by the plaintiff, at any time, were admissible in evidence, although they referred either by word or gesture to the locality of the pain; as if a man should put his hand upon his side and groan, or should say, "Oh! my head!" or utter similar complaints, being an expression of present pain or agony; but that any statement of his condition or feelings, made in answer to a question, or as a narrative, or with a view to communicate information, was not admissible. And a witness was accordingly allowed, against the defendants' objection, to testify that the plaintiff made exclamations of pain all the way home from the place of the accident; that he made

complaints of the pain for three or four days after the accident, and stated the locality of the pains; and that he sometimes put his hand upon his hip and sometimes upon his left side.

The jury returned a verdict for the plaintiff in the sum of \$561, and the defendants alleged exceptions.

E. Washburn, for the defendants. 1. The tender, made under Rev. Sts. c. 25, § 23, is of a peculiar character, and is not governed by the rules of the common law. 3 Steph. N. P. 2599. It does not admit the plaintiff's cause of action, as set forth in his declaration, for it was made before his declaration was filed. It admits only the facts necessary to sustain the action, and leaves every thing beyond nominal damages an open question. It does not estop the defendants to show the plaintiff's negligence in mitigation of damages. To allow the tender to operate as an admission of the cause of action would contravene the provisions of Rev. Sts. c. 100, § 18. 2. The plaintiff's own declarations as to the extent and degree of the injury, made subsequent to the time of the injury, and especially those made after the lapse of one or two days, were not admissible in evidence. 1 Greenl. Ev. § 102; 2 Steph. N. P. 1563; *Thompson v. Trevanion*, Skin. 402; *Rex v. Foster*, 6 Car. & P. 325.

B. F. Thomas and *G. F. Hoar*, for the plaintiff.

BIGELOW, J. The first question to be considered in this case is, how far the tender and payment into court by the defendants of a certain sum for damages, under Rev. Sts. c. 25, § 23, admit the plaintiff's case. We take the rule to be well settled, that where money is tendered and paid into court, upon a declaration which contains only one cause of action, specifically set forth, it operates as a conclusive admission of every fact, which the plaintiff would be bound to prove in order to maintain his action; leaving open only the question whether he is entitled to recover any greater amount of damages. By the decisions of the English courts in actions of *indebitatus assumpsit*, when the declaration contains the general money counts; and in those actions of tort, in which, by St. 3 & 4 Wm. 4, c. 42, a tender and payment into court is

allowed, when the declaration is general, by charging, for instance, the conversion or taking of various articles; the tender and payment only admit some contract, or some wrong, of the kind alleged in the declaration, with damages to the amount paid into court; and if the plaintiff seeks to recover a larger amount, he must prove a contract or tort, as well as a greater amount of damages. In such cases, the payment into court, being on a general declaration, cannot be applied to any particular contract, or to a wrong done by taking or converting any particular article, and does not therefore admit any thing beyond the amount paid in. But where a special contract is set out, or a specific wrongful act or omission is charged, by which an injury is done to a person or a single article of property, the payment can be applied only to such contract, act or omission, and admits it as alleged in the declaration. *Cook v. Hartle*, 8 Car. & P. 568; *Lloyd v. Walkey*, 9 Car. & P. 771; *Story v. Finnis*, 6 Welsb. Hurlst. & Gord. 123. And see *Hubbard v. Knous*, ante, 556.

The declaration in the present case alleges only one specific cause of action in satisfaction of which the money was tendered and brought into court, and we can see no reason why the rule above stated is not applicable to it. The statute, which gives the defendants the right to make a tender, does not limit or qualify the right. It does not specify how the tender is to be made, or what proceedings are to be had in the action after entry, in order to render the tender effectual to the party making it. It merely confers the right to make the tender. To ascertain the mode of proceeding, and the legal effect of the tender, we must resort to the rules of the common law in such cases. When a statute confers a right by the use of terms, which have a clear, well settled and fixed meaning in the law, it is a necessary and reasonable inference, that the legislature intended to give all the rights and attach all the burdens which the terms used legally import. More especially is this a sound rule of construction, where acts are passed upon subjects which relate to legal proceedings. In such cases, words are to be understood as used in their legal and technical sense, unless the contrary appears from the statute itself.

Rev. Sts. c. 2, § 6, cl. 1; *Merchants Bank v. Cook*, 4 Pick. 411. In this statute, the word "tender" is used without any thing to change or qualify its strict technical signification. We are therefore to suppose that the legislature intended so to use it, and to annex to it all the legal incidents and consequences, which properly attach to the word in legal proceedings. It follows, that when a party avails himself of the right to tender to the party injured a sum for damages under this statute, and thus seeks to secure the benefits conferred by it, he subjects himself to all the consequences which the common law attaches to the act. Of these, none is more clearly established, than the rule, that a tender in such a case admits the cause of action.*

And we think any other construction of the statute would be unreasonable and unjust. If, after making a tender, the defendants were allowed to come into court and plead to the merits of the action, the plaintiff would be compelled to incur all the expense of making out his case, at the risk, if he failed to recover more than the sum tendered, of paying not only his own costs but those of the other party, although he should succeed in establishing a good cause of action. Such a result would be at variance with the uniform policy of our statutes, which allow the prevailing party in all cases to recover costs. It would compel a party to pay the costs of proving that part of his case on which he prevails, and also allow the party against whom a good cause of action has been established to recover costs.

There would be, too, a very great inconsistency in the whole proceeding, if, after a tender, the merits of the whole case

* By St. 1852, c. 140, § 1, in any action at law or suit in equity, wherein damages only are sought to be recovered, the defendant may offer in writing to be defaulted, and that judgment may be rendered against him for a sum specified, as damages; and the plaintiff may, within ten days after notice of the offer, or within such further time as the court may allow, accept judgment for such sum, with costs to the date of such notice. By § 2, if the plaintiff does not so accept the offer, and recovers a less sum in damages, the defendant shall recover his costs from the date of the offer, and the plaintiff shall recover no costs after that date. Section 3 provides that no offer made under this act, and not accepted, shall be evidence against the party making the same, either in the same action or suit, or in any other.

Bacon v. Inhabitants of Charlton.

were still open to be contested at the trial. The party making the tender, in order to avail himself of it, must bring the money into court, and when brought in, the plaintiff has a right to take it out on request. Rule 14 of this court, 24 Pick. 368. In the event, therefore, of a verdict for the defendants, on the general issue, if the whole merits of the case are open, we should have the strange anomaly of a plaintiff taking money out of court upon a cause of action which he had failed to establish on the trial.

It was suggested at the argument, although not strenuously insisted on, that to allow a tender to operate as an admission of the cause of action, would contravene the provision in the Rev. Sts. c. 100, § 18, that "when a defendant shall plead two or more pleas in his defence, no averment, confession or acknowledgment, contained in any one of such pleas, shall be used or taken as evidence against him, on the trial of any issue joined on any other of the same pleas." It is sufficient answer to this objection to say, that a tender under our practice is not pleaded in defence to the action, but the money is brought into court under the common rule, as it is called, and an order or rule of court is passed, under which the plaintiff proceeds, if he so elect, to the trial of the cause; so that a tender cannot be regarded as within the terms of this statute, it not being a matter to be pleaded in defence to the action. The statute only refers to such averments and confessions as are required to be set out in a plea in defence to the action.

It seems to us, therefore, that the tender made by the defendants, and on which they relied, did admit the cause of action, and that the ruling of the court below on this point was correct. We have already stated the extent to which this admission goes. It admits the existence of every fact, which the plaintiff would be obliged to prove in order to maintain his action. In the case at bar, therefore, the tender must be taken as an admission of the use of ordinary care by the plaintiff at the time of the accident, because proof of such care is essential to the plaintiff's right of recovery. Ordinary care cannot exist where there is carelessness; and to allow a

defendant to prove carelessness for any purpose, either upon the merits or in mitigation of damages, would be to permit him to contradict the admission which, by his tender, he had made.

The next objection raised by the exceptions relates to the admission in evidence of expressions and complaints of pain by the plaintiff, after the accident. The rule of law is now well settled, and it forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration, that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of the body, which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a *present* existing pain or malady. Of course, it will always be for the jury to judge whether such expressions are real or feigned, which can be readily ascertained by the manner of them, and the circumstances under which they are proved to have been made. The ruling of the court below on this point was strictly in conformity with the rules of law, and was properly guarded and limited. 1 Greenl. Ev. § 102; *Aveson v. Lord Kinnaird*, 6 East, 188. These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable.

Exceptions overruled.

Felton v. Wadsworth.

NATHAN H. FELTON vs. DAVID WADSWORTH.

If an attorney, inadvertently and without the knowledge of his client, takes judgment and obtains execution for a sum known by his client to be more than is really due him, and, on discovering the mistake, goes to the officer, in whose hands the execution is, to give him instructions as to the service thereof; the taking of judgment for too large a sum does not dissolve an attachment made in the action, as against subsequent attaching creditors; and if the officer refuses to receive the attorney's instructions, and applies the property to the payment of subsequent attaching creditors, the officer will be liable to the client.

THIS was an action on the case against a constable, for an alleged neglect of duty, in not applying the sum of eighty dollars to the satisfaction of an execution, recovered by the plaintiff against Leeds Brown, and in the defendant's hands for collection.

At the trial in the court of common pleas, before Hoar, J., it appeared in evidence that a writ was sued out from that court by the plaintiff against said Brown, and served by the defendant, by attaching Brown's personal property, which the defendant afterwards sold for \$74.96; that the plaintiff recovered judgment in that action for \$65.85 debt, and \$16.18 costs; and that the execution issued thereon was delivered to the defendant, and satisfied for the costs and five dollars only of the debt.

The defendant's ground of defence was, that the judgment recovered by the plaintiff against Brown was for a sum greater than was justly due; that, on the day after the plaintiff's attachment, the same property was attached at the suit of Hiram Wadsworth, who obtained judgment and execution at the same term as the plaintiff; that said execution was placed in the defendant's hands with the plaintiff's execution; and that the defendant, upon notice that the plaintiff's attachment was vacated by taking a fraudulent judgment, applied the proceeds of said personal property to the satisfaction of the execution recovered by Hiram Wadsworth.

There was evidence tending to show, that the plaintiff's judgment against Brown should have been only for \$38.50 debt, and \$16.18 costs; that the judgment was taken for

Felton v. Wadsworth.

more than that sum inadvertently, by one of the plaintiff's counsel, without the plaintiff's knowledge; that, upon the discovery of that fact, Mr. Williams, who was also of counsel for the plaintiff in that suit, and to whose care, as attorney, the management of the same had been intrusted, went to see the defendant, within thirty days after the plaintiff's execution had issued, and stated to him the sum actually due upon said execution, and that he had come with a view to give him instructions relative to the service of said execution; but the defendant declined to receive such instructions.

The presiding judge instructed the jury, that if the plaintiff took judgment for \$65.85, knowing that not more than \$50 was due, and committed the execution to an officer, it would dissolve his attachment, as against subsequent attaching creditors, although the judgment was entered by the plaintiff's attorney for the larger sum, and the execution delivered to the officer, in ignorance of the amount really due, and without the direction of his client; and although, by reason of receipts and claims held by Brown, the defendant in that suit, the plaintiff could not tell what precise sum, less than \$50, was the sum due.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

B. F. Thomas and W. A. Williams, for the plaintiff.

E. Washburn, for the defendant.

FLETCHER, J. The instruction of the court of common pleas was to the effect, that if an attorney, in ignorance of what is really due, and without the directions of his client, takes judgment for a sum which the client knows is not due, and gives the execution to an officer, the attachment is dissolved, as against subsequent attaching creditors, though it could not be told precisely what was due, by reason of the defendant keeping back the vouchers and receipts in his possession, which would show the sums which he was entitled to have deducted. This instruction must also be taken in connection with the facts, to establish which the plaintiff offered evidence, namely, that the judgment was taken for too much inadvertently by the attorney, without the knowledge of the

plaintiff; and that, upon the discovery of the fact, the attorney stated to the defendant the sum actually due, and endeavored to give him instructions relative to the service of the execution, but the defendant declined to receive such instructions.

The doctrine of the instruction given to the jury is, that if an attorney, in ignorance of what is due, the defendant not appearing to produce his vouchers to ascertain the precise sum due, takes judgment for more than is due, without any direction from the plaintiff, intending no wrong, and in fact doing no wrong, and the attorney, upon discovering the error, attempts to correct it, and the officer refuses to be instructed as to the service of the execution, still the plaintiff must lose his attachment, and lose his debt, in favor of subsequent attaching creditors. This court cannot see how this instruction can be supported upon any just and sound principle of law.

But it is said, that there are two decisions of this court which sustain the instruction. The first case is *Fairfield v. Baldwin*, 12 Pick. 388. That was a case where a judgment was knowingly, deliberately, intentionally, and fraudulently obtained for more than was due, for the purpose of preventing the honest creditors from obtaining their debts out of the effects of their debtor. This fraudulent purpose was followed up by taking execution, and applying the goods or moneys of the debtor to pay this fraudulent execution, and thus defrauding the honest creditors of their debts. This fraudulent execution was set aside, and held invalid, for the purpose of preventing the fraud, and protecting the honest creditors. The principle of that case is, that a judgment designedly and fraudulently obtained for more than was due, for the purpose of defeating the claims of honest creditors, will not be permitted to accomplish its fraudulent purpose. The actual fraud is the essential element in the case.

The other case referred to, *Peirce v. Partridge*, 3 Met. 44, sets out manifestly a case of fraud, though it is not in express terms put on the ground of actual fraud. It is true that, in the language of the report, there is not found any imputation, in terms, of fraud; but fraud very distinctly appears

from the facts established by the evidence. The facts in the case clearly show, that a judgment was knowingly and intentionally obtained by the party, for a large sum more than was due. This was followed up by taking out execution, and actually taking the money of the debtor to satisfy the whole amount of the execution, a large part of which was known not to be due, and thus wrongfully, knowingly and intentionally taking the money from a subsequent attaching creditor, who claimed to have it applied in payment of his debt. In that case, the party knowingly took a judgment for more than was due, and by force of the execution, and by indemnifying the officer for satisfying the whole execution, took money which he knew did not belong to him; and thus withdrew the debtor's money from honest creditors, who were justly entitled to it, and were earnestly claiming it. It was manifestly fraudulent for a party thus to take money which he knew did not belong to him, and thus defeat the just claims of a fair creditor. Though this transaction is not, in terms, called fraudulent, yet, in the opinion of the court, after stating the evidence, it is expressly said: "This evidence seems to the court fully to establish the facts necessary to bring the case within the principle alluded to, and which was applied in the case of *Fairfield v. Baldwin*." 3 Met. 50.

The case of *Peirce v. Partridge* is therefore expressly put upon the same principle as that upon which *Fairfield v. Baldwin* was decided. It appears therefore that it was not the intention of the court to adopt any principle in *Peirce v. Partridge* different from that involved in *Fairfield v. Baldwin*. Nor does it appear, that in *Peirce v. Partridge* the court intended to extend the principle of the case of *Fairfield v. Baldwin*; but, on the contrary, the case of *Peirce v. Partridge* is expressly declared to be within the principle of the case of *Fairfield v. Baldwin*. Both these cases, therefore, were decided on the ground of fraud, and it is difficult to see on what other ground a party could be deprived of a just debt. The judgments in favor of the plaintiffs in those cases were declared invalid, because they were fraudulent, and were made the means of defrauding others.

Nothing appears in this case to bring it within the principle of those cases. There was evidence tending to show that the judgment was taken for too much, inadvertently, by one of the counsel for the plaintiff in the suit against Brown, and without the knowledge of the plaintiff; that, upon the discovery of that fact, Mr. Williams, who was also of counsel for the plaintiff in that suit, and to whose care, as attorney, the management of the same had been intrusted, went to see the defendant, within thirty days after the plaintiff's execution had been issued, and stated to him the sum actually due upon said execution, and that he had come with a view to give him instructions relative to the service of the writ of execution, but the defendant declined to receive such instructions. If these facts were established, it is difficult to see how the plaintiff could be held to have forfeited his debt. The plaintiff does not appear to have knowingly endeavored to collect on his execution what was not due to him, and what belonged to others. On the contrary, the attorney, upon discovering that the execution was for too large a sum, took immediate measures to correct the error, and to prevent the doing of any wrong to any one. So far as appears, no wrong was intended, and no wrong was in fact done.

Practically, the party seldom has any thing to do with making up a judgment. The business is wholly done by the attorney, and the judgment is supposed to be made up by the court. A party might deliver a note to an attorney for collection, telling him at the time that there had been payments on the note which had not been indorsed, but for which the maker had receipts, which he would probably produce, and directing the attorney to allow any receipts which might be produced with his name. The maker might pay no attention to a notice from the attorney, and, upon being sued, might be defaulted without producing any receipts, and the attorney then take judgment for the whole face of the note, and put the execution into an officer's hands, upon the knowledge of which coming to the plaintiff, he might take measures to correct the mistake, and to prevent the execution being levied for any more than was justly due. Here would be a judgment taken

Mann v. Houghton.

for more than was known to be due, and an execution put into an officer's hands; but for that reason only, to set aside the judgment, in favor of a subsequent attaching creditor, would hardly be warranted by any principle recognized as fit and proper to be acted on in the administration of justice.

Penalties and forfeitures are visited upon fraud and wrong doing. The principle acted on in such cases is intended to prevent fraud and imposition. This was the principle involved in the cases referred to in support of the ruling in this case. The executions in those cases were tainted with fraud, and they were wholly set aside, to prevent their being used, under the form of law, as the instruments of wrong and injustice.

There must therefore be fraud, to bring a case within the principle of these adjudged cases. If, in the present case, there was no fraud, no wrong done, or attempted or intended to be done; if the judgment was taken for too much inadvertently, by the attorney, and the party had no purpose of obtaining on his execution any more than was due to him, and no more was taken; then this case does not come within the principle of the adjudged cases, and there is no just principle upon which the plaintiff could be deprived of what was justly due to him.

Exceptions sustained.

DANIEL MANN vs. SAMUEL HOUGHTON.

When an action pending in court is referred, by a rule of court, to arbitrators, who award costs to the defendant, but before the award is accepted by the court, the plaintiff takes the benefit of the insolvent law, and obtains his discharge, the discharge does not bar the defendant's claim for the costs awarded.

So, when the condition of a replevin bond is broken by a failure of the plaintiff in replevin to deliver up the property on demand of the defendant after judgment for a return, a discharge in insolvency of a surety on the bond from all debts due at a time previous to such demand, though subsequent to the commencement of the action of replevin, is no bar to an action against him on the bond.

THIS was an action of assumpsit to recover the amount of an account annexed to the writ, and was entered in the court

Mann v. Houghton.

of common pleas, at the March term, 1849. At the June term following the action was referred, under a rule of court, to arbitrators, who met on the 18th of September, 1849, to hear the parties; but the plaintiff not appearing, they made an award, "that the defendant recover of the plaintiff the costs of this reference, taxed at \$13.44, and costs of court, to be taxed by the court."

On the 24th of November, 1849, the plaintiff petitioned for the benefit of the insolvent law, and a warrant was issued for the seizure of his property, and the first publication of notice that the warrant had issued was made on the same day; on the 12th of December, 1849, an assignee was duly chosen, and an assignment of the insolvent's estate made to him by the commissioner; and on the 13th of June, 1850, the plaintiff obtained his discharge from all debts due from him previously to the said 24th of November.

On the calling of the docket of the court of common pleas, at the December term, 1849, the insolvency of the plaintiff was suggested, and entered on the record.

The award, having been left with the clerk of the court in the previous vacation, was opened and filed by him at the June term, 1850, and the case continued. At the September term, the defendant moved that the report be accepted, but the plaintiff objected, and moved that the action be dismissed, on the ground of the proceedings in insolvency; of which he produced and filed in the case an authenticated copy. But the court refused to dismiss the action, and ordered the award to be accepted. The defendant then moved for judgment, but the plaintiff objected, on the ground of the proceedings in insolvency and the discharge of the plaintiff, and moved that the action be dismissed. But this motion, at a subsequent term, was overruled by the court, who ordered judgment to be entered on the award, and that the defendant should recover his costs against the plaintiff accordingly. Whereupon the plaintiff excepted to the rulings of the court.

E. Fuller, for the plaintiff.

The assignment of the plaintiff's estate, under the insolvent law, took from him all his interest in the cause of action de-

clared on, and deprived him of all right to proceed in the action; and therefore this assignment must protect him from liability on any judgment against him for costs. *St. 1838, c. 163, § 5.* No one but the assignee could prosecute the action, and as he did not come in and prosecute, the action should have been dismissed without costs. It was as if the plaintiff were actually dead, and his administrator had not come in. Had the award been in favor of the plaintiff, the proceeds of the suit would have passed to the assignee for the creditors; and therefore the plaintiff ought not to be held liable to a judgment for costs, or to pay costs, when the award is against him.

N. Wood, for the defendant, cited *Beardman v. England*, 6 Mass. 70; *St. 1838, c. 163, §§ 3, 7*; *Sampson v. Clark*, 2 Cush. 173; *Kelton v. Phillips*, 3 Met. 61; *Hodges v. Chace*, 2 Wend. 248; *Mechanics' Bank v. Hazard*, 9 Johns. 392; *Stebbins v. Willson*, 14 Johns. 403.

METCALF, J. The defendant's claim could not have been proved against the estate of the plaintiff, under the proceedings in insolvency, because it was not payable nor due until after the award was accepted; which was several months after the first publication of notice that a warrant had issued for taking possession of the plaintiff's estate. And as this claim was not provable against the plaintiff's estate, it is not barred by his discharge. *St. 1838, c. 163, §§ 3, 7*; *Sampson v. Clark*, 2 Cush. 173.*

Exceptions overruled.

* A similar decision was made in Suffolk, March term, 1852.

GEORGE H. SLEEPER vs. GEORGE MILLER & others.

This was an action of debt upon a replevin bond, executed by George Miller as principal, and by Giles A. Meacham and Newell Adams as sureties. Miller and Adams were defaulted; and Meacham and the plaintiff submitted the case to the judgment of the court upon the following facts:

The bond in suit was given on the 28th of December, 1846, in an action of replevin commenced on that day by Miller against Sleeper, the present plaintiff. On the 29th of January, 1850, Sleeper recovered judgment against Miller for a return, for nominal damages and for costs, upon which judgment execution was issued, and committed to an officer, who, after returning part of the replevied property to the plaintiff, and making diligent search for the remainder without success, demanded of Miller, on the 9th of March, 1850, the remainder of the property; which Miller

Stone v. Hubbard.

AI STONE vs. CHESTER HUBBARD.

The testimony of experts is admissible, where the figures expressing the date of an instrument are obscure and difficult to be deciphered, to show what the true date is.

The purchaser from an assignee in insolvency, of a promissory note payable to the insolvent, or his order, and not indorsed either by the insolvent or the assignee, may maintain an action thereon, in the name of the insolvent, against the maker, if the insolvent interposes no objection.

THIS was an action of assumpsit to recover the amount of a promissory note, made by the defendant, payable to the plaintiff or his order, and alleged in the declaration to be dated the 20th of March, 1844. The writ bore date of the 25th of September, 1849.

At the trial, which was in the court of common pleas, before *Byington, J.*, the plaintiff offered in evidence the note in suit, which was not indorsed by him. The defendant admitted the execution of the note:

It was in evidence, that the plaintiff petitioned for the benefit of the insolvent law on the 11th of January, 1845, and that a warrant was issued to a messenger on the same day to take possession of his estate; that the first meeting of his creditors was held on the 2d of February, when an assignee was chosen, to whom all the property and estate of the insolvent, including the note, were duly assigned; and that afterwards and before the commencement of the action, the note was sold

refused to return. And the officer afterwards returned the execution satisfied in part.

On the 16th of October, 1849, Meacham was declared insolvent on his own petition, and a warrant was issued for the seizure of his property; and the first publication of notice of the issuing of the warrant was made on the same day; and on the 21st of May, 1850, he obtained his discharge from all debts due from him previously to said 16th of October.

G. H. Preston for the plaintiff.

No counsel appeared for the defendant.

BY THE COURT. There was no breach of the condition of the replevin bond, until after the first publication of notice that a warrant had issued for the seizure of Meacham's property, under the insolvent laws. The plaintiff's claim, therefore, is not barred by Meacham's discharge, because it was not provable against his estate.

Judgment for the plaintiff.

and assigned by said assignee to John S. Bowker, who had since owned the same, and who had caused this action to be commenced and prosecuted in the name of the plaintiff. The defendant, who had duly specified this point in defence, now contended that the action was erroneously brought in the name of the plaintiff, and that it should have been brought in the name of his assignee. But the judge ruled that the action was properly brought in the name of Stone.

The defendant, who had also specified in defence the statute of limitations, contended that the true date of the note was the 30th of March, 1842, and not the 20th of March, 1844, as described in the declaration; and this was the only question submitted to the jury. In the figures expressing the date of the note, there appeared to be some peculiarity and ambiguity, the principal matter in dispute being whether the last figure was a 4 or a 2. To show what that figure or character was, the plaintiff offered in evidence the opinions of two witnesses as experts, one of whom then was, and the other had formerly been, the cashier of a bank in Worcester. They testified that they had been cashier of banks for several years, and had been in the habit of examining and were skilled in handwriting, and in discriminating between genuine and counterfeit writings; but that they had never seen the defendant write, and did not know his writing, or the manner in which he made figures. The defendant objected to the admission in evidence of the opinions of the witnesses, as to what the figure or character in question was; but the judge overruled the objection and admitted the witnesses, both of whom then testified, that the figure or character was, in their opinion, a 4, and that they thought that the date of the note was March 20th, 1844.

The jury returned a verdict for the plaintiff, for the amount of the note, and interest thereon from the 20th of March, 1844; and the defendant alleged exceptions.

J. Mason, for the defendant. 1. The action should have been brought in the name of the assignee in insolvency. *S.* 1838, c. 163, § 5. 2. The testimony of the witnesses offered as experts was incompetent. The question what the figure in question was should have been determined by the court, not

put to the jury. *Remon v. Hayward*, 2 Ad. & El. 666; *Crofts v. Marshall*, 7 Car. & P. 597; *Sheldon v. Benham*, 4 Hill, 129; 1 Greenl. Ev. § 280.

C. H. B. Snow, for the plaintiff.

BIGELOW, J. The testimony of the witnesses, offered as experts in handwriting, was rightly admitted. The rule is well settled, that when the characters in which a paper is written are obscure and difficult to be deciphered, the evidence of persons, whom practice and experience in examining writing have made skilful, is competent for the purpose of aiding the court or jury in arriving at a true reading of the document. *Wigram on Wills*, (3d ed.) 12, 188, 196; *Masters v. Masters*, 1 P. Wms. 425; *Norman v. Morrell*, 4 Ves. 769; *Sheldon v. Benham*, 4 Hill, 129. And see *Armstrong v. Burrows*, 6 Watts, 268.

The question whether this action can be maintained in the name of the present plaintiff, the payee of the note in suit, upon the facts disclosed at the trial, has been substantially determined by previous decisions of this court. *Hodges v. Holland*, 19 Pick. 43; *Sigourney v. Severy*, 4 Cush. 176; *Drury v. Vamevar*, 5 Cush. 442. The last case, being in many respects similar to the case at bar, is a very strong authority in favor of the maintenance of this action. The principle on which these decisions rest is, that the purchaser of the note has a right to recover all that is due upon it; that the rights of the promisor cannot be in any way prejudiced by a suit in the name of the payee, and if the latter does not interpose and object, the mode of enforcing the contract is wholly immaterial to the defendant, and constitutes no valid ground of defence.

In the case at bar, by the purchase from the assignee, the owner acquired all the property of the payee and of his assignee in the note and its proceeds, and a right to enforce its payment in the name of some one. The assignee, having received it without indorsement and having sold and transferred it by delivery only, the purchaser cannot maintain an action on it in his own name. It may be that a suit could be brought upon it in the name of the assignee; but of this we

 Stone v. Hubbard.

express no opinion. See *Drury v. Vannevar*, *ubi sup.* It is upon its face like an ordinary chose in action, which can be enforced only in the name of the assignor; and we can see no technical objection to a suit in the name of the payee, upon these facts. There is no variance between the declaration and proof. The promise was originally to the payee or his order, and the note, never having been indorsed, on its face is still payable only to the plaintiff. The promise is directly to the party who sues. The rights of the defendant are wholly unaffected by an action brought in the name of the plaintiff, instead of being in the name of the assignee or purchaser. Indeed, the suit could not stand more favorably for the defendant. Every ground of defence, even the right of set-off, is open to him in a suit in the name of the payee. Rev. Sts. c. 96, §§ 1-11; *Clark v. Parker*, 4 Cush. 361, 365. A recovery in this action would be a good bar to any other suit upon the note, as the payee, his assignee and the owner of the note would be alike concluded by the judgment.

We are aware of the English authorities, in which it has been held, that after bankruptcy an action cannot be maintained in the name of the bankrupt, upon a contract made with him before bankruptcy, and that the assignee only has power to enforce such claims by suits in his own name. But these decisions were founded on the peculiar language of the act of 6 Geo. 4, c. 16, § 63, by which the assignees are not only expressly empowered to bring suit in their own names to recover debts due the bankrupt, but it is further provided that, after the assignment, "neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same." There are no such negative words in our insolvent laws. And the earlier English decisions on this point are in effect overruled by the decision of the court of exchequer chamber, reversing the judgment of the court of queen's bench, in *Herbert v. Sayer*, 5 Ad. & El. N. R. 965, 974.

The effect of an objection by the payee to a suit in his name, in a case like the present, we have not considered, because in this case no such objection was interposed.

Exceptions overruled.

EBENEZER BALL vs. FREDERICK W. NEWTON.

A party, who promises in writing "to pay the master's, clerk's, messenger's and assignee's fees, respectively," in certain proceedings in insolvency, about to be commenced, which promise is delivered to the clerk at the first meeting of creditors, is not liable to the assignee for his services in the case, if it does not appear that the assignee knew of the promise, until after he had performed the services.

THIS was an action of assumpsit against the administrator of Horace Newton, founded upon the following writing: "Worcester, January 19, 1847. For value received, we jointly and severally promise to pay the master's, clerk's, messenger's and assignee's fees, respectively, in the case of Joseph Battles, an insolvent debtor; provided the same are not otherwise paid within six months. Joseph Battles. Horace Newton." This action was brought to recover the sum of fifty dollars as compensation for the services of the plaintiff as assignee of Joseph Battles.

At the trial in the court of common pleas, before *Merrick, J.*, it appeared in evidence that shortly after this paper was signed Battles went into insolvency, and the plaintiff was duly chosen his assignee; that Battles kept this paper in his own possession from the time it was signed until the first meeting of his creditors, when he delivered it to the clerk in the matter of the proceedings in insolvency, who retained it until the close of the proceedings, and then delivered it the plaintiff. The plaintiff also offered to prove that he faithfully discharged his duties as assignee; that his services as such were reasonably worth fifty dollars; that he had received nothing therefor; and that no funds or property had come to his hands out of which he could pay himself. But the presiding judge ruled that, upon the facts in evidence, and those offered to be proved, the plaintiff could not maintain his action. The plaintiff thereupon submitted to a verdict for the defendant, and alleged exceptions to the ruling of the judge.

S. B. I. Goddard, for the plaintiff.

N. Wood, for the defendant.

FLETCHER, J. The paper, relied upon by the plaintiff, is

Worcester Mutual Fire Insurance Company v. City of Worcester.

not, of itself, a contract; there are no sufficient parties to the paper to make a contract; there is no promisee. If the paper had been shown to the plaintiff, and he had accepted it, and had become assignee and performed the services upon the strength of the paper, that might have formed a contract, upon which the plaintiff might, perhaps, maintain this action. But it does not appear that the plaintiff ever saw or heard of this paper, till after he accepted the office of assignee, and performed all the services of the office, for which he now claims compensation. So that it does not appear that he accepted the paper, or performed any services upon the strength of it, or in reliance upon it, or did any thing whatever to create a good consideration and make a contract between him and the defendant's intestate; and therefore no contract of the defendant's intestate with the plaintiff is shown, upon which the plaintiff can recover.

Exceptions overruled.

THE WORCESTER MUTUAL FIRE INSURANCE COMPANY vs.
THE CITY OF WORCESTER.

Mutual fire insurance companies are not liable to taxation for personal estate invested in their corporate names and held by them for the purposes of their incorporation.

This was an action of assumpsit to recover \$142.71, the amount of a tax, assessed upon the plaintiffs and paid by them to the defendants.

The plaintiffs were incorporated by St. 1822, c. 112, for twenty eight years; and by that act and the acts in addition thereto, (Sts. 1823, c. 125; 1842, c. 13,) were authorized to insure any buildings, furniture, carriages, cattle, hay or grain, in the county of Worcester, against damage by fire; and were directed to invest the moneys advanced by each person insured, within sixty days after such advancement, in bank stock, stocks of the United States, or notes and bonds secured by mortgages; and were made liable to taxation by

Worcester Mutual Fire Insurance Company v. City of Worcester.

any general law affecting similar corporation. By *St.* 1847, *c.* 73, their incorporation was continued for twenty eight years more; with all the powers and privileges, and subject to all the duties, liabilities and restrictions, set forth in the thirty seventh and forty fourth chapters of the revised statutes.

The case was submitted to the court upon the statutes above referred to, and the following statement of facts: At the time of the assessment of this tax, the plaintiffs had outstanding policies covering and insuring about \$10,300,000 of property held by about 10,400 different individuals, residing in the various towns in the county of Worcester, and had invested the funds of the company, held by them to pay losses and return premiums, in bank stock, notes and mortgages, &c., as required by law. And on the bank stock, so held by them, the tax in question was assessed by the assessors of Worcester, in 1850, and paid by the plaintiffs under protest, after they had requested the assessors to abate the tax, which they refused to do. If this tax was legally assessed, the plaintiffs are to become nonsuit; otherwise, the defendants are to be defaulted.

E. Washburn, for the plaintiffs.

P. C. Bacon and *D. Foster*, for the defendants.

BIGELOW, J. The embarrassment attendant upon the decision of the question in this case arises in great measure from the very general character of the provisions of law, regulating the taxation of personal estate, which not unfrequently renders their application to particular cases perplexing and difficult. The general principle governing the assessment of property invested in moneyed corporations is sufficiently simple and intelligible. The statute requires that it shall be assessed to the persons who own shares in such corporations, and not to the corporation itself, who own and manage it. *Rev. Sts. c. 7, § 4.* The only distinctly recognized exception to this rule is that of the machinery employed in any branch of manufactures, which, for the purposes of taxation, is regarded as part of the real estate to which it is attached, and is assessed to the corporation in the town or city where it is used. *Rev. Sts. c. 7, § 10.*

Worcester Mutual Fire Insurance Company v. City of Worcester.

The difficulty in applying the general rule above stated to the assessment of personal estate, held by the plaintiffs, arises from the peculiar character given by the statutes of the commonwealth to corporations established for the sole purpose of insuring property upon the mutual principle against risks by fire. In a certain sense such corporations may properly be called moneyed corporations. They usually have a large amount of personal estate invested in bank stock and other securities, standing in their corporate names. In the case of ordinary stock companies these would be taxable to the several stockholders, in the proportion which the shares held by each bore to the whole amount. The value of the shares in such cases represents the personal property held by the corporation. But a mutual insurance company has no shares, and, strictly speaking, no stockholders. Its capital, so far as it has any, is not by law divided into a certain fixed number of aliquot parts, each one representing an equal portion of its entire property. Nor has it, in fact, like other corporations, any fixed sum, established by law, which constitutes its capital. Its funds, which stand in the place of capital, necessarily depend upon the extent of its business. The greater the amount at risk on policies, the larger will ordinarily be its absolute and contingent assets, out of which losses are to be paid. Its capital, and not merely its profits, is made up of premiums on the risks which it assumes. But notwithstanding these and other apparent peculiarities in the constitution of such corporations, we are satisfied, upon careful consideration, that the same rule of taxation is applicable to them as to other moneyed corporations.

A mutual insurance company under the statutes of this commonwealth is, to a certain extent, an agent or depositary, having no property absolutely its own, but holding that of its members in trust for certain specific, well defined purposes. Each member of the corporation contributes a certain amount to its funds for a fixed period of time. The sum thus deposited does not become the exclusive property of the corporation. It is rather in the nature of a special deposit, which the corporation is to hold and manage, and upon which it has

Worcester Mutual Fire Insurance Company v. City of Worcester.

certain liens or claims, regulated by law, for the payment of expenses, and of losses by fire; but in which the original depositor also retains an interest, so that he can demand its repayment, in whole or in part, upon the termination of his policy by lapse of time or otherwise. In truth, each person insured in a mutual insurance company holds, in many respects, the same relation to the corporation as a stockholder in an ordinary stock corporation. He is, by force of his policy and the payment of his premium, a member of the corporation. He has the right to vote at its meetings, and to take part in the management of its affairs. His policy, like a common certificate of stock, is the evidence of his membership and of the extent of his right or interest in the funds of the corporation. This share or interest, although it may fluctuate from time to time in proportion to the losses of the company, is always of an ascertainable value, and capable, with the policy, of being sold and assigned for a valuable consideration, according to certain conditions and restrictions established by the by-laws. And when a policy expires by its own limitation or by agreement, the assured has a right to receive back and take out his share or proportion of the entire assets of the corporation. In this last particular, his right and interest in the corporate property is more direct and immediate than that of a stockholder in a stock corporation, because the latter, on ceasing to be a member, cannot withdraw his part of the capital, but can only sell his shares, leaving the funds of the corporation unimpaired. It would seem to follow from this view of the nature and constitution of mutual insurance companies, that their funds, although invested in their corporate name, still so far remain the property of the individual members as to fall very clearly within the principle, established by the statute, requiring property invested in moneyed corporations to be assessed to individual proprietors therein, and not to the corporations themselves.

This view is greatly strengthened by the consideration, that there is no provision of law, in relation to the assessment of taxes, directly applicable to corporations of this peculiar character, and rendering them liable to taxation in their corporate

capacity for personal estate. The question, therefore, resolves itself into one of construction of the general provision regulating the taxation of personal estate invested in moneyed corporations, and it is the duty of the court to put that interpretation upon the statute, which will make its practical application to various cases consistent and harmonious. It would certainly be an incongruity to hold, that personal estate invested in mutual insurance companies was liable to a different rule of taxation from that invested in other corporations established for similar purposes, on account of the slight differences between the two kinds of corporations in their organization and mode of conducting business.

It has occurred to us, that there would be great practical difficulty, in assessing taxes on personal property belonging to corporations similar in their organization to the plaintiffs, arising from the fact that such corporations have usually no legal location or habitation which would authorize any city or town to assess them therein. The general provision of law is that personal estate shall be assessed in the town or city where its owner resides. Rev. Sts. c. 7, § 9. This provision might, perhaps, be so construed as to include a corporation established for the purpose of transacting business in a particular place designated by law, and in which its capital is to be exclusively employed. But mutual insurance companies usually have no legal location to which they are by law confined, and their transactions are not limited to any one town or city. The plaintiffs are expressly empowered to insure property situated anywhere within the county of Worcester, but their place of business is not fixed by their act of incorporation. Suppose they should establish offices for the transaction of their business in several different towns in the county, as they could legally do, where then should their personal estate be assessed? The mere fact, that their office is situated in Worcester would hardly seem to afford sufficient ground for a claim of right on the part of that city to assess them for their personal estate. Besides; their members, those who, as we have already seen, are in fact the owners of its funds do not all reside in Worcester. They are scattered in

Raymond v. Raymond.

the various towns throughout the county. It would be inconsistent with the whole system of taxation in this state, that personal estate thus situated should be assessed in the town where the corporation happens to have its place of business. The effect of allowing such an assessment would be to deprive other towns of the right of assessing property in reality belonging to their own citizens.

In considering this question, we do not think it unimportant that this is the first case, so far as we know or are informed, in which personal estate, held by a mutual insurance company under its acts of incorporation, has been assessed by any city or town to the corporation. These institutions have now been established within this commonwealth upwards of half a century, without any attempt hitherto to render them liable to taxation in this mode. An unbroken practice for so long a period, in a matter in which men are not apt to slumber on their rights, is, to some extent, a contemporaneous construction of the law, which, in a doubtful question, is certainly entitled to some weight.

For these reasons we are all of opinion that mutual insurance companies, established under the statutes of this commonwealth, for the purpose of insuring against risks by fire, are not taxable for personal estate, invested in their corporate names, and held by them for the purposes for which such corporations are established. There must therefore be

Judgment for the plaintiffs.

NATHAN RAYMOND, JR. vs. ABIJAH RAYMOND.

Where a mortgagee of real estate made a quitclaim deed of his interest in part of the mortgaged premises, and afterwards, with the knowledge of the mortgager entered on the mortgaged premises for breach of condition and for the purpose of foreclosure, a certificate of which entry, not stating on what part of the premises it was made, was indorsed on the mortgage deed, and duly recorded, and his grantee continued in possession of the part conveyed to him for three years

Raymond v. Raymond.

after the entry; it was held, that the entry of the mortgagee and the possession of his grantee constituted a perfect foreclosure of the mortgage, as to that part of the premises held by the latter.

FLETCHER, J. This is a suit in equity to redeem an estate in Westminster, being one half of a saw-mill. The facts and principles, upon which the questions presented and argued by counsel must be decided, are quite simple, and may be briefly stated and easily understood.

The premises sought to be redeemed were a part of a large parcel, lying upon both sides of a highway, consisting of a dwelling-house and about an acre of land on the north side of the highway, and an undivided half of a saw-mill, with the whole of a shop standing by the same, and an undivided half of the mill-yard, and the privilege of flowing or using the water as had been done there before, the whole of which premises were conveyed, on the 24th of October, 1838, by Nathan Raymond, senior, to Plympton Barnes, who on the same day made a mortgage of the whole premises to said Raymond, conditioned to pay \$400 on the 1st of April then next, and four notes of hand, amounting to \$1,030. The premises in question were thus mortgaged, with other land, by Plympton Barnes to Nathan Raymond, senior, who therefore became the first mortgagee of the premises.

On the 30th of August, 1839, Barnes mortgaged all the same estate, which he had already mortgaged to Nathan, to Milton Raymond, to secure the payment of \$299.68 on demand. On the 15th of October, 1839, Milton Raymond made entry upon the premises to foreclose; and in pursuance of such entry his mortgage was foreclosed; and Milton Raymond thus became the absolute owner of the equity, subject to the mortgage to Nathan Raymond, senior.

Nathan Raymond, senior, on the 10th of February, 1842, made a deed to the defendant, in consideration of \$425, of all his "right, title, claim and demand in and unto one half part, in common and undivided, of a certain saw-mill, situated," &c., "and one undivided half part of land originally laid out for a mill-yard, and of the privilege of flowing and using the water as has heretofore been generally done, reserving a right to the

Raymond v. Raymond.

owner of the shop to use said mill-yard, as is necessary for the use of said shop; the same being a part of the real estate conveyed to me by Plympton Barnes, by deed of mortgage, dated the 24th of October, 1838;" "and it is hereby intended to quitclaim whatever right I have to the above described real estate by virtue of said mortgage deed." The plaintiff seeks to redeem the premises granted in this deed. The plaintiff, by a conveyance from Milton Raymond, has the right and title which Milton had to the premises, that is to say, the right, as owner of the equity, to redeem the estate from the mortgage to Nathan Raymond, senior, under a conveyance from whom the defendant was and is in possession.

As the defendant has but a portion of the mortgaged premises, if they were open to redemption, questions would arise in regard to the redemption of a part of the mortgaged premises.

But the question here is, whether or not the mortgage of Barnes to Nathan Raymond, senior, under whom this defendant claims, has been foreclosed. If this mortgage has been foreclosed, then, of course, there is no right in the plaintiff, or any body else, to redeem the premises in question in this suit, or any other part of the premises conveyed by Barnes to Nathan Raymond, senior. The inquiry then is, has the mortgage of Barnes to Nathan Raymond, senior, been foreclosed? Now, on the 18th of October, 1842, as appears by a certificate of two witnesses, upon the mortgage of Barnes to Nathan Raymond, senior, which certificate was recorded in the registry of deeds on the 26th of October, 1842, the mortgagee, Nathan Raymond, senior, "entered and took peaceable possession of the within named real estate, and declared, in their presence, that he should hold possession for and on account of condition broken, for the purpose of foreclosing the same." There was no evidence, other than this certificate, upon what part of the estate he entered. The certificate of the witnesses was under oath, and the entry thus made for the purpose of foreclosing, was made in the manner and with all the forms required by the statute. A legal entry, for the purpose of foreclosing, having been thus made by the mortgagee, more than

three years before this suit was brought, the mortgage must have been foreclosed by the lapse of time, of course, unless there was something to prevent a foreclosure.

It is maintained, on the part of the plaintiff, that there was no foreclosure, for the reason, as it is said, that Nathan Raymond, senior, had no right to enter on the demanded premises at the time he did enter, because he had made a quitclaim of his right in these premises to Abijah Raymond, this defendant, who was in possession. It does not appear upon what part of the mortgaged premises the mortgagee entered to foreclose. It was not necessary that he should enter on the particular part now in question. A good entry to foreclose the whole mortgage might have been made, and, so far as appears, was made, upon some other portion of the mortgaged premises. But it is not for this plaintiff to raise questions of right between Nathan, senior, and Abijah Raymond. The question is, as to a foreclosure as between Nathan Raymond, senior, the mortgagee, and Barnes, the mortgagor, or rather Milton Raymond, who had acquired the right of the mortgagor. Surely, as between these parties, the deed to Abijah presented no obstacle to a legal and perfect foreclosure by entry.

The quitclaim deed to Abijah embraced but a part of the mortgaged premises; and, whatever right or title Abijah took to this part of the mortgaged premises, was subject to redemption or foreclosure precisely as the rest of the mortgaged premises. Nathan, senior, the mortgagee, retained the mortgage and mortgage notes, and the rest of the premises, and his relation to the mortgagor was in no way changed or affected. Nathan retained his right to enter under his mortgage to foreclose the whole mortgaged premises; and Abijah could have no objection to a foreclosure, as it would be for his interest, by confirming his title. The rights of the mortgagor to redeem were in no way changed or prejudiced, as he might still redeem the whole by payment to Nathan, who still retained the mortgage and the mortgage debt and the mortgaged premises, as at first, except what interest he had given to Abijah in a part. What would have been the rights of Abijah, as between

Raymond v. Raymond.

him and Nathan, senior, if the premises had been redeemed, it is not necessary to consider. Here was then a good, valid and legal entry to foreclose. But it is still maintained, on the part of the plaintiff, that there was no foreclosure, because it is said, the mortgagee did not retain actual possession. After possession was taken by the mortgagee, Abijah held the actual possession under the mortgagee. Here was then an entry and actual possession, and all this, it would seem, with the perfect knowledge of Milton Raymond, who had the right to redeem, and under whom the plaintiff claims, by virtue of a conveyance made after the foreclosure was perfected. The evidence in the case sufficiently shows knowledge on the part of Milton Raymond, who held the right to redeem, as he himself voluntarily gave up the possession of the premises in question to Abijah. It is not necessary to put the decision of the case on the ground that an entry in the presence of witnesses, and a record of their certificates under oath, according to the statute, which would be constructive notice, together with actual knowledge on the part of the mortgagor, which would seem to be sufficiently shown by the evidence in this case, would be a good and valid foreclosure, without retaining actual possession; because here, in fact, the actual possession was retained. Here was then an entry, actual possession and knowledge on the part of the mortgagor, so that it is difficult to conceive how a more perfect foreclosure could be effected, by entry without judgment.

The mortgage having been thus fully foreclosed, the plaintiff comes quite too late with his claim to redeem, and the bill must be dismissed.

E. Washburn, for the plaintiff.

N. Wood, for the defendant.

EDMUND F. DIXIE vs. CHENERY ABBOTT.

The defendant, in an action to recover the price of wines and spirituous liquor sold to him by the plaintiff, may prove, under the general issue, without any specification of defence, that the plaintiff was not licensed, according to law, to sell the same.

So, in an action of the indorsee against the maker of a promissory note, the defendant may prove, under the general issue, without any specification of defence, that the note was indorsed to the plaintiff when it was overdue; and that it was given to the payee in payment of goods bought of him by the defendant, for the purpose, known to the payee, of being carried about from place to place and exposed to sale, contrary to the provisions of St. 1846, c. 244.

THIS was an action of assumpsit on an account annexed to the writ, most of the items of which, as appeared by the report of an auditor, to whom the case had been referred, consisted of charges for wines and spirituous liquors, sold by the plaintiff to the defendant, in less quantities than fifteen gallons, between July, 1838, and February, 1840.

The defendant pleaded the general issue, but did not file any specification of defence. At the trial in the court of common pleas the defendant objected to the plaintiff's right to recover for these items, on the ground that the plaintiff was not licensed to make the sales; and offered evidence to show that the plaintiff was not so licensed. But the judge rejected the evidence, because the defendant had not filed any specification of defence, giving notice of his intention to rely upon such a ground of defence, or that the sales were made within the commonwealth. And a verdict being rendered for the plaintiff, the defendant alleged exceptions.

E. Washburn, for the defendant, was stopped by the court.

J. H. Mathews, for the plaintiff.

METCALF, J. The case of *Hulet v. Stratton*, 5 Cush. 539, is decisive of this. It was there held, on much consideration, that when the defence to an action on contract is, that the contract is void for illegality, such defence is not within the 39th rule of the court of common pleas, which requires a specification of "matter of discharge or avoidance of the action." We have since examined the English decisions,

made under the new rules of pleading established in 1834. One of those rules is in these words: "In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." Another of those rules requires that all matters in confession and avoidance shall be specially pleaded, in actions of debt on simple contract, as directed in actions of assumpsit. Under these rules, a defence, like that on which the present defendant relies, must be pleaded specially; not because it is a matter of discharge or avoidance, but because, by the express terms of the rule, it is included among the matters which are required, in addition to matters of discharge, to be so pleaded. But it is decided that matters, not enumerated in the rule, which show that there never was a debt before action brought, need not be pleaded, but may be given in evidence under the general issue. Thus, in *Broomfield v. Smith*, 1 Mees. & Welsb. 542, and Tyrw. & Gr. 929, in an action of debt for goods sold and delivered, the defendant was permitted, under the general issue, to show that the goods were sold on a credit which had not expired when the action was brought. It was insisted for the plaintiff, that this was matter in avoidance of the action, which the new rules required to be pleaded specially. But Mr. Baron Alderson said: "How does this evidence confess and avoid the debt? It denies that there ever was a debt before action brought. There is no debt till the credit has expired. Avoiding is admitting the cause of action, and afterwards avoiding it." See 1 Archb. N. P. (2d ed.) 144, 233, 300; 1 Saund. Pl. & Ev. (2d ed.) 226 - 228.

New trial ordered.

NOTE. In the case of *Benoni W. Robinson v. Aze. Howard*, Middlesex, October term, 1851, which was an action by the indorsee of a note against the maker, the defendant pleaded the general issue, but did not file any specification of defence. It was decided that the defendant might prove that

Dixie v. Abbott.

the note was indorsed to the plaintiff, when it was overdue, and that it was given to the payee in payment for goods bought of him by the defendant, for the purpose of being carried about from place to place and exposed for sale by the defendant, contrary to the provisions of St. 1846, c. 244, entitled "an act concerning hawkers and pedlars;" the defendant not being licensed so to do, and the payee knowing, when he sold the goods, the purpose for which the defendant bought them.

D. S. & W. A. Richardson, for the plaintiff.

B. F. Butler, for the defendant.

INDEX.

ABATEMENT.

See EXCEPTIONS, 1.

ACCOUNTS.

See EVIDENCE, 7, 8, 9; NEW TRIAL, 2, 3.

ACTION.

1. M. agreed with S., the lessee of the Revere House, to keep good carriages, horses, and drivers, on the arrival of certain specified trains, at a railroad station, to convey passengers to the Revere House, and in consideration thereof, S. agreed to employ M. to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing between S. and B., had been terminated by mutual consent; but B. still continued to use the words "Revere House," as a badge on his coaches and on the caps of his drivers, although requested not to do so by S.; and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case brought by M. against B. for using said badge and diverting passengers, it was held that M., by his agreement with S., had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B. used those words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff, and a violation of his rights, for which this action would lie, without proof of actual, specific damage; and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers, as he could prove to have been actually diverted from his coaches to the defendant's. *Marsh v. Billings*, 322.

2. Discharge of. See SPECIFICATION OF DEFENCE; WAIVER.

3. Superseding of one form of by another. See REPLEVIN, 1.

ADMINISTRATION AND ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMISSIONS.

- See PAYMENT OF MONEY INTO COURT; TENDER, 1.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIEN PASSENGERS.

See ASSUMPSIT, 4; BOND.

AMENDMENT.

Courts of record have power, at any time, as well after, as during the term, at which any entry is made, of their own motion or on the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case; and are the exclusive judges of the necessity and propriety of so amending and extending their records, and of the proofs and of the sufficiency of the proofs on which to proceed. *Balch v. Shaw*, 282.

APPEAL.

See COMPLAINT, 1.

ARBITRAMENT AND AWARD.

1. It is no ground for setting aside an award, that the arbitrators did not examine the witnesses under oath; especially when no objection was made at the time to the manner of examination. *Maynard v. Frederick*, 247.
2. Arbitrators, who are authorized by the submission to inquire into all matters arising out of the trade and dealing of the parties, without restriction as to time, may go behind a receipt given by one of the parties to the other, and look into the settlement on which the receipt was founded. *Ib.*
3. A submission to arbitrators having provided that the award to be made up by the arbitrators, or by a majority of them, should be final and binding upon both parties; two of the arbitrators, at a regular meeting for the purpose, at which all three were present, agreed upon an award, which was then drawn up and signed by one of them; the other took time to deliberate, and afterwards signed it; but the third refused to agree to the award, and never signed it. It was held, that the award was valid. *Ib.*
4. Arbitrators have no power to award costs, unless authorized by the submission. *Ib.*
5. When arbitrators, not authorized by the submission to award costs, make an award that one party pay the other a certain sum of money, and an additional amount for costs of arbitration, the part awarding costs may be rejected, and the remainder stand good. *Ib.*

-See INSOLVENT DEBTORS, 2.

ASSIGNEE IN INSOLVENCY.

See CONTRACT, 1; INSOLVENT DEBTORS, 2, 5.

ASSIGNMENT.

See INSURANCE, 2; PLEADING.

ASSUMPSIT.

1. When a deed of land, subject to a mortgage previously made by the grantor, expresses that the sum secured by the mortgage is part of the consideration of the deed, and that the deed is made on condition that the grantee shall assume and pay the mortgage debt and the interest thereon, as they severally become due and payable; and the grantee enters upon and holds the estate, and does not pay the interest when it falls due; the grantor, after paying the interest on demand of the mortgagee, may maintain assumpsit against the grantee to recover the amount so paid. *Pike v. Brown*, 133.
2. B. leased a shop to P., by indenture, for a term of years, during which D. signed and delivered to P. an agreement, not under seal, "to take the lease of the shop, and to pay to B. the rent as it becomes due, and to take the place of P. in all cases, so far as the shop, P. and B., are concerned." P. then left the premises, and D., with the knowledge of B., entered upon and occupied them for some months, but left before the expiration of the term: During D.'s occupation, the bills were made out to P., but presented to and paid by D. It was held that the agreement given by D. to P., did not amount to a legal assignment of the lease; that the facts did not warrant a presumption of the surrender of the lease, so as to make D. liable to B. for the use and occupation of the premises; but that B. was entitled to recover the rent, for the remainder of the term, of D., in an action of assumpsit upon the agreement, as being a promise made to P. for B.'s benefit. *Brewer v. Dyer*, 337.
3. If a party, with full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there is fraud in the party enforcing the claim, and a knowledge on his part that the claim is unjust; although the party paying protests at the time that he is not answerable, and gives notice that he shall bring an action to recover the money back. *Benson v. Monroe*, 125.
4. A vessel arrived at Boston in 1847, with alien passengers on board; after the passengers were landed, the master refused to pay the head money, of two dollars for each of one hundred and forty passengers, demanded by the superintendent of alien passengers, under the statute of 1837, c. 288, § 3, which had been decided by this court to be constitutional and valid; whereupon the overseers of the poor commenced a suit, (under Rev. Sts. c. 46, § 28, and St. 1837, c. 288, § 6.) against the owners of the vessel to recover the penalty of two hundred dollars for each passenger, and attached the vessel in the sum of thirty thousand dollars: The owners thereupon paid the head money demanded, and costs, under protest, and with notice that

they intended to sue to recover it back : The statute of 1837, c. 238, § 3, was afterwards decided by the supreme court of the United States to be unconstitutional and void. It was held, that the owners could not maintain an action to recover back the head money and costs so paid. *Ib.*

5. A party, of whom a tax, illegally assessed, has been collected by distress, can recover of the town, in an action for money had and received, only the amount of the tax, with interest thereon from the time of the sale, and not the surplus value of the property sold, nor the costs of distress. *Shaw v. Becket*, 442.

6. The plaintiff in an action of assumpsit on the common counts may recover for the board of the defendant and his servants. *Tremain v. Edwards*, 414.

See INSOLVENT DEBTORS, 11 ; SCHOOL DISTRICT ; TAX, 2.

ATTACHMENT.

The sureties on a bond, given to dissolve an attachment, conditioned for the payment within thirty days after final judgment of such amount as the plaintiff shall recover, are not discharged, nor the obligee's right of action against them suspended, by the commitment of the defendant on execution, after breach of the condition of the bond ; and if the defendant be afterwards discharged on taking the poor debtor's oath, the obligee will be entitled, in an action on the bond, to judgment and execution for the amount recovered in the action in which the attachment was made. *Murray v. Shearer*, 333.

See JUDGMENT.

ATTORNEY.

See DEED, 1 ; EVIDENCE, 10 ; JUDGMENT.

AUDITOR.

An auditor, appointed under the provisions of the Rev. Sts. c. 96, to hear the parties, examine their vouchers and evidence, state the accounts between them, and make report thereof to the court, is authorized to consider and determine whether a particular individual was the authorized agent of one of the parties, to purchase, on his behalf, the goods charged by the other in account against him. *Locke v. Bennett*, 445.

See NEW TRIAL, 2.

BANK.

A bank agreed with D. to discount his paper, indorsed by M., to a certain amount, and that D. should leave with them, on deposit, one sixth of the several discounts ; and D. agreed to give them the first offer of all his business ; and it was also agreed, that either party might terminate the arrangement by giving ninety days' notice to the other. After obtaining some discounts, D. informed the bank that he should extend his discount to the full amount, and gave them a check for a sixth part of said amount, and received of the bank a certificate of deposit thereof, payable after ninety days' notice of his desire to withdraw it. D. took the benefit of the insolvent law ; and M. gave his notes to the bank in renewal of the notes of D., on which he

was indorser, the bank agreeing to prove the notes of D. against his estate in insolvency, and to apply the proceeds towards the payment of M.'s notes. It was held, that the entire proceeds of the discount not being payable by the bank on demand, the discount was so far void, under Rev. Sts. c. 36, § 58, that the bank could not prove the notes of D. against his estate; nor maintain an action against M., on his notes given in renewal of the notes of D. *Western Bank v. Mills*, 539.

See TRUSTEE PROCESS, 2.

BANKRUPT.

A discharge, under the English bankrupt law, of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in this state; whether the creditor proved his debt under the English commission of bankruptcy or not. *May v. Breed*, 15.

See INSOLVENT DEBTORS, 11.

BARK, MEASUREMENT OF.

The Rev. Sts. c. 28, § 201, do not require that bark, lying on the owner's land in the country, should be measured by a public measurer, before it is offered for sale. *Huntington v. Knox*, 371.

BILL IN EQUITY.

See EQUITY.

BOND.

A bond, given by the master or owner of a vessel arriving within this state with alien passengers on board, to the boarding officer duly appointed by the city of Boston under St. 1837, c. 238, § 1, in the penal sum of sixty five thousand dollars, reciting that sixty five of such alien passengers, named therein, have been landed and now reside in the city of Boston, who, in the opinion of the overseers of the poor of the city are likely to become chargeable to the commonwealth for their support, and conditioned to indemnify the city and commonwealth from all charge and expense which may arise from such passengers for the term of ten years, does not conform to St. 1837, c. 238, § 2: (1.) Because it is in the sum of as many thousand dollars as there are passengers, and not in the sum of one thousand dollars for each passenger; (2.) because it does not show that the boarding officer made the examination, required by the statute, to ascertain whether any of the passengers came within the description of persons for whom he had a right to exact a bond; and (3.) because it does not show that the passengers named were lunatic or indigent persons, incompetent, in the opinion of the boarding officer, to maintain themselves, or who had been paupers in any other country; and if it is not proved, in an action brought on such bond, that there were in fact passengers for whom he could legally exact a bond, the bond is void. *Boston v. Capen*, 116.

See ATTACHMENT; EXECUTOR, &c., 1; INSOLVENT DEBTORS, 10; POOR DEBTORS.

BOOKS OF ACCOUNT.

See EVIDENCE, 7, 8, 9; NEW TRIAL, 2, 3.

BRIDGE.

See WAY, 10.

BURDEN OF PROOF.

See EVIDENCE, 1.

BY-LAW.

A by-law of the city of Boston, providing that the expense of constructing a common sewer, after deducting the portion to be paid by the city, shall be assessed upon the persons and estates deriving benefit therefrom, either by the entry of their particular drains thereon, or by any more remote means, apportioning the assessment according to the value of the lands thus benefited, independently of any buildings or improvements thereon, is valid. And it is no objection to the validity of an assessment, made pursuant to such by-law, that the greater part of one lot assessed is lower than the bottom of the sewer. *Downer v. Boston*, 277.

CARRIER.

A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for their transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his property, by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, springs against the chain stretched across the end of the boat and attached to a hook, insufficient in strength for the purpose for which it is designed, breaks the hook, and throws himself and the wagon overboard, whereby the horse is drowned, and the merchandise in the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred, the proprietors of the ferry are not responsible for the loss of the horse and the damage to the merchandise so occasioned. *White v. Winnisimmet Co.* 155.

CERTIORARI.

Where an application to county commissioners to lay out a town way, on the refusal of selectmen to lay out the same, did not allege that they "unreasonably" neglected and refused to do so; but the town appeared and were heard, without any objection to the omission, and the commissioners stated, in their adjudication, that the selectmen "unreasonably" refused to lay out the road; it was held, that the error was merely one of form, and no ground for issuing a *certiorari*. *Monterey v. Berkshire*, 394.

COMPLAINT.

1. A justice of the peace, who was also a trial justice, issued a warrant, after St. 1850, c. §14, took effect, commanding a party charged with a crime to be brought before himself, or some other justice of the peace for the county; the defendant was brought before him, and tried and convicted before him, acting as trial justice, and appealed. It was held, that the defendant could not, on the trial of the appeal, object to the irregularity in the form of the warrant, it not appearing from the records or papers, that he took any such objection before the justice. *Commonwealth v. Henry*, 512.
2. A warrant, issued by a justice of the peace, after St. 1850, c. §14, took effect, directing the officer to bring the defendant "before A., or some other justice of the peace within and for the county," (A. being a trial justice, as well as a justice of the peace,) authorizes the officer to arrest the defendant and take him before A., as a trial justice, but not before any other trial justice; and if the officer arrests the party to take him before A., not finding whom, he, without taking his prisoner before any other justice of the peace, takes him before another trial justice, the officer and his assistants, but not the magistrate who issued the warrant, will be liable in trespass to the party arrested. *Stetson v. Packer*, 562.

CONSPIRACY.

1. An indictment for a conspiracy to cheat and defraud, which does not set forth the means intended to be used, is insufficient; and is not aided by averments of overt acts done in pursuance of the conspiracy. *Commonwealth v. Shedd*, 514.
2. An indictment for a conspiracy alleged that the defendants, on the 5th of January, 1850, conspired to defraud the H. insurance company, by removing and secreting the goods belonging to one of the defendants, and insured by said company, and then pretending that they had been destroyed by fire. The evidence was, that the policy was issued on the 2d of January, 1850; that the goods were removed on the 5th; that the shop from which they were removed was destroyed by fire on the 7th; and that the defendants had no knowledge of any insurance of the goods by the H. insurance company until after the fire. It was held, that this evidence did not support the allegation in the indictment. *Commonwealth v. Kellogg*, 478.

CONSTITUTIONAL LAW.

The legislature of this commonwealth has power to establish lines in the harbor of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf, extended or maintained beyond such lines, a public nuisance; and statutes establishing such lines take away the right of the proprietors of flats in the harbor beyond the lines to build wharves thereon, even when they would be no actual injury to navigation; and such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public uses without compensation, within the meaning of the Declaration of Rights, art. 10; nor as impairing the obligation of the grant made by

the colony ordinance, and thus transgressing the prohibition of the constitution of the United States, art. 1, § 10, against passing laws impairing the obligation of contracts. But such statutes do not affect the right to maintain wharves erected before their passage. *Commonwealth v. Alger*, 53.

See FUGITIVE SLAVES.

CONTRACT.

1. A party, who promises in writing "to pay the master's, clerk's, messenger's and assignee's fees, respectively," in certain proceedings in insolvency, about to be commenced, which promise is delivered to the clerk at the first meeting of creditors, is not liable to the assignee for his services in the case, if it does not appear that the assignee knew of the promise until after he had performed the services. *Ball v. Newton*, 599.
2. S. agreed with B. to furnish such good and responsible persons, as B. should designate to act as agents for the sale of certain books, with the said books, at a certain price, supplying their orders, and receiving their remittances, and placing all money so received, above the amount of the price agreed upon, to the credit of B., and, at the close of the labors of such agents, to receive all the books returned by them uninjured, and credit the same, at the cost price, to B.; and B., on his part, guarantied to S. the security and full payment of the stipulated price for all books so furnished. It was held, that the contract between S. and B. was that of principal and agent, and not that of vendor and purchaser, and that books, furnished under this contract to the agents designated by B., did not become B.'s property. *Eldridge v. Benson*, 483.

See ASSUMPSIT, 1, 2; BANK; DAMAGES; RECEIPTOR; WAIVER.

CORPORATION.

1. The subscribers for and holders of stock in a manufacturing corporation which has been defectively organized, and transacted business under such defective organization, do not thereby become partners, general or special, in such business; and the records of such supposed corporation are not admissible against the members, as evidence of any agreement or understanding among them, as to their own rights and liabilities as members of a partnership, or of the extent of authority given to their general agent, as agent of a partnership. *Fay v. Noble*, 188.
2. G. and his associates having been incorporated by act of the legislature as a manufacturing corporation, met and agreed to accept the act, and fixed the proportions in which the shares should be distributed, and also agreed that the corporation should purchase certain lands of G., with the buildings and machinery thereon, then unfinished, but to be completed by G. The corporation was afterwards organized, and G. conveyed the lands to them; but before he had finished the buildings and machinery, or had paid all the instalments on his shares, and before any certificate had been issued to him, he became insolvent, and proceedings in insolvency were instituted. It was held, that the corporation had no lien on the shares of G. for sums ex-

peared by them, before or after he became insolvent, in finishing said buildings and machinery. *Massachusetts Iron Co. v. Hooper*, 188.

See INNKEEPER, 1; PARISHES, &c.; TAX, 1.

COSTS.

See ARBITRAMENT AND AWARD, 4, 5; ASSUMPSIT, 5; DAMAGES, 2; INSOLVENT DEBTOR, 9.

COUNSEL FEES.

See DAMAGES, 2.

COUNTY COMMISSIONERS.

A county commissioner is not disqualified by the Rev. Sta. c. 14, § 26, to act in the laying out of a road, by reason of being an inhabitant of a town to the line of which the road in question extends, and with a road in which it is intended to connect. *Monterey v. Berkshire*, 394.

See CERTIORARI; EQUITY, 4; WAY, 1-5.

COURTS.

See AMENDMENT; HABEAS CORPUS, 2.

COVENANT.

See DEED, 2.

CUSTOM.

See USAGE.

DAMAGES.

1. In an action for the breach of a special contract, the plaintiff may recover, as part of his damages, such profits as would have accrued to him from the contract itself, if it had been performed; but not those which he would have realized from other contracts entered into for the purpose of fulfilling such special contract. *Fox v. Harding*, 516.
2. The measure of damages, in an action brought for a breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if any thing, of the article sold; and if the vendor has, in the mean time, sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty, is *prima facie* evidence of the amount which he can recover of his vendor; and, if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defence thereof. *Reggio v. Braggiotti*, 166.

See ACTION; ASSUMPSIT, 5; TRESPASS; WAY, 6, 9.

DEED.

1. A deed, purporting to be the deed of A., and executed "B. for A.," is well executed as the deed of A., if B. was duly authorized to execute it. *Mussey v. Scott*, 215.

2. H., residing in Illinois, made a covenant with S., residing in Boston, to convey to him certain lands in Illinois, the conveyance to be made before a day named. At the time of this covenant, the parties verbally agreed that H. should record the deed in Illinois, before sending it to S., in Boston, but so as to have it in Boston before the day named in the covenant. It was held, that depositing a deed of the lands, duly executed, in the proper registry in Illinois, to be recorded, was a delivery to S., and, if made before the day named, a full performance of the covenant, although the deed was not sent to Boston until after that day. *Shaw v. Hayward*, 170.
3. A grant of land, bounded "on the sea or flats," passes the flats appurtenant to the land granted. *Saltonstall v. Long Wharf*, 195.
4. In construing a deed of land, bounded "easterly on the sea or flats," a lease for years, made to the grantee by a former proprietor, and continuing at the date of the deed, of a shop standing on the land conveyed, and bounded "easterly on the sea or flats of the lessor," if admissible in evidence, has no tendency to prove that the flats appurtenant to the upland were not included in the deed. *Ib.*
5. S. conveyed land to H., describing it as bounded "north on the line of Blandford"; the line of the town of Blandford was subsequently established by the act of the legislature; after which H. conveyed to C. by a similar description. It was held, that the line so established was the northern boundary of the land included in the deed from H. to C.; and that parol evidence was inadmissible to show that, prior to this act of the legislature, the line of Blandford was understood and reputed to be farther north than the line so established, and was defined by a line of marked trees, and that the deed from H. to C. was intended and understood by the parties to convey the same land included in the deed from S. to H. *Cook v. Babcock*, 526.
6. Certain Indians, in a grant of land, made a reservation of a tract, bounded north on a line some miles in length, "running a due west course" from a given point. In a controversy, arising more than a hundred years after, between parties owning land on different sides of the Indian line, it was held, that evidence of general tradition or reputation, and of the understanding and occupation of the owners of lands bounding on the line, and of deeds made by them, and acts of the legislature referring to the line, would warrant the jury in inferring that a line, varying some degrees from a due west course, was located, laid out, assented to and adopted by the parties; and that, if the jury did so find, the line so established must be taken to be the true Indian line. *Kellogg v. Smith*, 375.

See MORTGAGE, 4; WITNESS, 3, 4.

DEMAND.

See MORTGAGE, 6; RECEIPTOR.

DEVISE.

See WILL.

DEVISEE.

1. A devisee of real estate, having only a contingent estate therein, or a present interest, defeasible upon a condition subsequent, is not entitled to bring an action on the administration bond. *Stevens v. Cole*, 467.
2. Whether a devisee of real estate is a person interested in the estate of a deceased testator, and entitled as such to bring an action on the administration bond, within the provision of the Rev. Sta. c. 70, § 6, *quære*. *Ib*.

DISCHARGE.

In Bankruptcy. See BANKRUPT.

In Insolvency. See INSOLVENT DEBTORS, 4-10.

DISCOUNT.

See BANK.

DONATIO CAUSA MORTIS.

See INSOLVENT ESTATES.

DRAIN OR SEWER.

See BY-LAW.

EQUITY.

1. P., the purchaser of one half of a brig, gave W., the seller, his notes for a certain amount of the purchase money, and also a bond, reciting that said amount was to run on bottomry on the said half of the brig, and conditioned to pay the notes at maturity, and stipulating that P. should keep the half of the brig insured, and that, on P.'s failure to pay the notes, W. might sell said half at public auction for the payment of the notes and expenses, accounting to P. for any surplus; and P., by the same instrument, appointed W. his attorney, to convey said half to the purchaser at such sale. It was held, that this instrument did not create an equitable lien upon the brig, nor declare a trust which could be enforced as against a subsequent purchaser from P., with or without notice. *Webb v. Walker*, 46.
2. A bill in equity, brought by the assignee of an insolvent debtor, praying that the defendant, to whom such debtor has made a conveyance of land, for the purpose of giving an unlawful preference, may be ordered to give up the deed, and release the land to the assignee, shows that the plaintiff has a plain, adequate and complete remedy at law, by a writ of entry, and this court therefore have no jurisdiction under St. 1838, c. 163, § 18, although a discovery is prayed for; for a discovery might be had in aid of proceedings at law. *Woodman v. Saltonstall*, 181.
3. A bill in equity, brought by one claiming an estate in three undivided fourths of the mines in a certain tract of land, with the right to pass and repass, to dig for and carry away the ores, against the owner in fee of the whole of the soil of said tract, for digging and carrying away ore, and wasting and destroying the same, and forcibly resisting and disturbing the plaintiff in the exercise of his right, is not within the equity jurisdiction of this court, either on the ground of a nuisance by a disturbance of the use of a

right of way, or as showing the parties to be tenants in common of the mines. *Adam v. Briggs Iron Co.* 361.

4. The bill in equity, provided by St. 1849, c. 222, § 5, for enforcing the orders of county commissioners, respecting the manner of constructing a railroad where it crosses a public highway, can be maintained only by the mayor and aldermen of the city, or the selectmen of the town, within which the way is situated, and not by any individual inhabitant of such city or town, although he is owner in fee simple of the land over which the way is located. *Brainard v. Connecticut River Railroad*, 506.
5. In a bill in equity, under the Rev. Sts. c. 81, § 8, to obtain possession of a horse, secreted from the plaintiff, so that it cannot be replevied, an allegation that the plaintiff was the owner of the horse, and had the right of possession, is sufficient, without setting forth the particulars of his title; especially when the plaintiff waives an answer under oath. *Strickland v. Fitzgerald*, 530.
6. A master in chancery, to whom a bill in equity, brought to redeem a mortgage on a house and land, was referred, to state an account of the amount due on the mortgage, disallowed certain charges made by the mortgagee, for expenses incurred by him in repairs undertaken with a view to remedy a defect in the original structure, which repairs, by reason of the employment of unskilful persons, and the use of unsuitable materials, failed of their object. It was held, that the question was one peculiarly within the province of the master to decide; that every reasonable presumption was to be made in favor of his decision; and that, unless it clearly appeared by his report or otherwise, that he had acted under a mistake, his report was to be sustained. *Adams v. Brown*, 220.
7. There is no fixed rule of law limiting the compensation to which a mortgagee, in possession of real estate, may be entitled for his services in the care and management of the mortgaged premises. Therefore, where a master in chancery, to whom it was referred to state an account between mortgagor and mortgagee, allowed the latter a commission on the rent received by him of five per cent. only, for his services in the care and management of the estate, and at the same time reported that he was satisfied that such commission would not compensate the mortgagee for his trouble, but that he did not feel at liberty to allow more, not knowing that the court had ever allowed a greater rate of commission; the report was recommit-
ted to the master, with directions to allow the mortgagee such further sum as he might think just and reasonable. *Id.*

See INSOLVENT DEBTORS, 3; MORTGAGE, 8; PARTNERSHIP.

EVIDENCE.

1. In an action to recover the price of goods sold, brought more than thirty and less than sixty days after the sale, the plaintiff admitting that the sale was on a credit of thirty or sixty days, the burden of proof is on the plaintiff to show that the credit was for thirty, and not for sixty days. *Morrison v. Clark*, 218.
2. In an action on the case against the owners of a vessel, for the loss of cer-

tain packages of glassware, by reason of negligence in stowing and conveying them; after proof of the place and manner of the loss of the vessel, and evidence on the questions, whether the goods were stowed under deck, and whether they could have been washed out by the sea, if they had been so stowed; a witness acquainted with the navigation about the place of the loss of the vessel; and who was near the place at the time of the loss, cannot be asked whether, taking into view the condition and situation of the vessel, and all the accompanying circumstances, the goods could, in his opinion, have been broken to pieces in the hold, or washed out of the hold, if they had been stowed therein. *New England Glass Co. v. Lovell*, 819.

3. The testimony of experts is admissible, where the figures expressing the date of an instrument are obscure and difficult to be deciphered, to show what the true date is. *Stone v. Hubbard*, 595.
4. If the first indorser of a promissory note, made payable to his order, is obliged to pay it, he may maintain an action for contribution against a subsequent indorser, on proving that, by an oral agreement between the indorsers at the time of indorsing the note, they were, as between themselves, co-sureties. *Weston v. Chamberlin*, 404.
5. In an action against a town for an injury sustained by reason of a defect in a highway, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible in evidence for the plaintiff. *Bacon v. Charlton*, 581.
6. The acts and declarations of one party are not competent evidence to affect another, unless it is first proved that both have been engaged in a common purpose and design; and whether the evidence is sufficient to establish the concert between them, or proper to be laid before the jury as tending to establish it, is within the discretion of the presiding judge, and not a ground of exception. *Burke v. Miller*, 547.
7. On the trial of an action, brought against the assignee in insolvency of a mercantile firm, to recover property mortgaged by them to the plaintiff, in which the defence is placed on the ground that the mortgage was made with the intention of giving an unlawful preference, and therefore void, the books of account of the firm, verified by the testimony of one of the partners, as being in the handwriting of his copartner and of their bookkeeper, and as having been recognized and acted upon habitually by the firm as an authentic and true statement of all their mercantile concerns, are competent evidence for the defendant, for the purpose of showing that the firm were, and knew themselves to be, insolvent at the time of making the mortgage. *Holbrook v. Jackson*, 136.
8. Meals furnished to one and his servants, from day to day, are a proper subject of book charge. *Tremain v. Edwards*, 414.
9. In an action to recover for meals furnished to the defendant and his men, which the plaintiff was admitted to prove by his book account and supplementary oath, the plaintiff, having stated on his cross examination, that it was "only at the first time," that the defendant requested the plaintiff to furnish the meals; and having also stated in answer to a previous interrogatory,

"that the defendant at the first requested that the meals should be furnished whenever they were there;" it was held, that the two answers should be taken together, and that they related to the future as well as the present. *Ib.*

10. Where a person goes to the office of an attorney at law, to obtain professional advice, and there consults with a student at law in the office, the communications, made by him to the student in the course of such consultation, are not protected from disclosure in court, even if he supposes the student to be an attorney. *Barnes v. Harris*, 576.
11. An acknowledgment in writing of the demandant's title, made by the tenant in a writ of entry, is sufficient evidence of the demandant's title to be submitted to the jury in a subsequent action of trespass brought by him against the tenant for an entry on the land described in the writ of entry. *Kellenberger v. Sturtevant*, 465.

See CORPORATION, 1; DEED, 4-6; LANDLORD AND TENANT, 2; NEW TRIAL; PAYMENT OF MONEY INTO COURT; POOR DEBTORS, 4, 5; PRINCIPAL AND AGENT; SALE, 2; SPECIFICATION OF DEFENCE; TENDER, 1; TRUSTEE PROCESS, 4; USAGE; WAIVER; WITNESS; WRIT OF ENTRY.

EXCEPTIONS.

1. By St. 1840, c. 87, §§ 4, 5, the rulings of the court of common pleas on the admissibility of evidence, and their instructions to the jury, on the trial of an issue joined on a plea in abatement, are not the subject of a bill of exceptions. *Bartol v. Stanwood*, 115.
2. In an action to recover property included in a bill of sale purporting to be executed by the plaintiff to the defendant, an instruction given by the court to the jury, "that, if they should find that the parties had deliberately reduced their contract to writing by the bill of sale, and had therein specified the property in question in such terms as imported a legal conveyance of the same, and there was no uncertainty as to the subject matters intended to be conveyed, parol evidence of conversations between the parties should not be regarded by them to contradict or vary the written conveyance," is not open to exception, as leaving questions of law to the jury. *Ridgway v. Bowman*, 268.

See EVIDENCE, 6; WITNESS, 4.

EXECUTION.

See ATTACHMENT; MORTGAGE, 1.

EXECUTOR AND ADMINISTRATOR.

1. An executor's bond, approved by the judge of probate, in which the sureties are each bound in half the sum in which the principal is bound, is not for that cause void, but is binding on the obligors, and sufficient to give effect to the executor's appointment, and to render his acts as such valid; but it seems that this court, on an appeal from the decree of the judge of probate, approving a bond in that form, would not countenance such a departure from the usual course of proceeding. *Baldwin v. Standish*, 207.

2. A party, duly appointed under the laws of the late republic of Texas, "to the succession" of a person deceased there, is not accountable in this state for personal property held by him in that capacity. *Norton v. Palmer*, 523.
3. An administrator, who, after representing the estate of his intestate insolvent, sells real estate, pursuant to license from the probate court, may apply the proceeds of such sale to the payment in full of a debt secured by mortgage on said real estate, duly recorded, but previously unknown to him and the purchaser, and charge himself in his account with the balance only of such proceeds. *Church v. Savage*, 440.
4. A testator devised land to his executor T. in part trust to sell such part thereof, as in T.'s judgment would promote the interest of all concerned, for the payment of certain legacies and debts; T. declined to act as executor; an administrator with the will annexed was appointed, and, acting under the mistaken supposition that he was authorized by the will to sell, sold the land, and charged himself with the purchase money in his probate account; T. afterwards accepted the office of trustee under the will, and sold the land to the same purchaser for a sum equal to the consideration received by the administrator, adding interest from the date of that sale. It was held, that the administrator was entitled to be credited in his probate accounts with the sum with which he had so charged himself, and with any interest which had accrued to the estate on such sum. *Dunbar v. Tainter*, 574.

See DEVISEE; INSOLVENT ESTATES; POWER; PROCHAIN AMI;
TRUSTEE PROCESS, 1.

EXPERTS.

See EVIDENCE, 2, 3.

FERRYMAN.

See CARRIER.

FLATS.

By the colony ordinance of 1647, commonly known as the ordinance of 1641, the proprietors of upland bounding on the sea have an estate in fee in the adjoining flats above low water mark and within one hundred rods of the upland, with full power to erect wharves and other buildings thereon; subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation; and subject, also, to such restraints and limitations of the proprietors' use of them, as the legislature may see fit to impose for the preservation and protection of public and private rights. *Commonwealth v. Alger*, 53.

See CONSTITUTIONAL LAW; DEED, 3, 4.

FRAUD.

See ACTION; TENDER, 2.

FRAUDS, STATUTE OF.

See ASSUMPSIT, 1.

FRAUDULENT CONVEYANCE.

See EQUITY, 2; INSOLVENT DEBTORS, 6.

FUGITIVE SLAVES.

1. Congress has power, under the constitution of the United States, to pass laws for the reclamation of fugitive slaves. *Sims's Case*, 285.
2. The act of congress of 1850, c. 60, concerning fugitives from service, being substantially like the act of congress of 1793, c. 7, the constitutionality of which has been settled by the decisions of the courts of the United States, must be deemed constitutional by this court. The authority which it confers on commissioners of the circuit courts, and its making no provision for a trial by jury, do not make it unconstitutional. *Ib.*

GUARANTY.

A covenant to indemnify A. against all damages and costs which he may incur in consequence of indorsing any notes of B., past or prospective, relates only to indorsements made by A. for the accommodation and at the request of B., and does not extend to indorsements by A. of notes given him by B. for his own debts to him. *Trask v. Mills*, 552.

See PROMISSORY NOTE, 3.

HABEAS CORPUS.

1. When it appears, from a petition for a writ of *habeas corpus*, that the petitioner, if brought before the court, would not be entitled to a discharge, the writ will not be issued. *Sims's Case*, 285.
2. How far it is competent for one court, by a writ of *habeas corpus* to the executive officer of another court, to take a prisoner from the custody of the latter, *quære. Ib.*

HARBOR OF BOSTON.

See CONSTITUTIONAL LAW.

HEIR.

See WILL, 2, 3.

IMPOUNDING CATTLE.

1. Actual knowledge, by the owner of beasts impounded, of the impounding thereof, is not equivalent to the written notice required by the Rev. Sta. c. 113, § 8. *Coffin v. Field*, 355.
2. The owner of beasts impounded does not waive the right to maintain trespass against the field-drivers by whom the beasts were taken and impounded, on the ground of irregularities or omissions in their proceedings, by paying the fees of the field-drivers and pound-keeper; nor by declaring to a third person, after the commencement of the action, that he should require the defendants to prove that the place where they took the beasts was a public highway. *Ib.*

INDICTMENT.

See COMPLAINT; CONSPIRACY.

INNKEEPER.

1. If the agent of a corporation, engaged in their business, becomes the guest of an innkeeper, and is robbed in the inn, while he is a guest, of money delivered to him by his principals to be expended in their behalf, the innkeeper is liable therefor to the corporation. *Berkshire Woollen Co. v. Proctor*, 417.
2. If a traveller who puts up at an inn, and is received there as a guest, makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder. *Ib.*
3. The liability of an innkeeper for a loss by his guest extends to all the movable goods and money of the guest, which are placed within the inn, and is not restricted to such things and sums only, as are necessary and designed for the ordinary travelling expenses of the guest. *Ib.*

See USAGE.

INSOLVENT DEBTORS.

1. It is not necessary to the validity of proceedings in insolvency, instituted on the petition of the debtor, that there should be a formal adjudication by the master in chancery, or commissioner, before issuing the warrant, of the debtor's inability to pay all his debts, of his willingness to assign all his property for the benefit of his creditors, or of the fact that the debts due from him amount to the sum required by the statute. *Holbrook v. Jackson*, 136.
2. A mortgagor of personal property gave one of his creditors an order addressed to the mortgagee, directing him to hold the property for the benefit of such creditor till paid, and to sell the same within six months, and apply the proceeds to the payment of such creditor's debt, after deducting the amount due the mortgagee; and this order was accepted by the mortgagee. Before the six months expired, or any sale was made, the mortgagor took the benefit of the insolvent law, the mortgagee was appointed assignee, and all the property of the mortgagor was assigned to him; and he, as such assignee, sold the property in question. It was held, that the order transferred no interest in the property to the creditor to whom it was given, but was merely an authority to the mortgagee to sell, which was revoked by the assignment in insolvency; and that the creditor could not maintain assumpsit against the mortgagee. *Fuller v. Emerson*, 203.
3. A creditor of an insolvent debtor, claiming a lien on certain property of the debtor, may apply to this court, exercising the chancery powers conferred by St. 1838, c. 163, § 18, to have such a lien declared in his favor, without first proving his debt against the debtor's estate. *Massachusetts Iron Co. v. Hooper*, 183.
4. Under St. 1844, c. 178, § 4, the dissent of a majority in value of the creditors of an insolvent debtor, who have proved their claims, must be filed

within six months after the assignment, in order to defeat his discharge. *Crocker v. Stone*, 341.

5. No discharge in insolvency is valid, even as against a creditor who proves his claim, and is himself the assignee, unless the third meeting of the creditors is held within six months from the time of the assignee's appointment. *Ib.*
6. A mortgage, made by a debtor, who is actually insolvent, and has no reasonable cause to believe himself solvent, to secure a debt to a preëxisting creditor, who has reasonable cause to believe the debtor insolvent, is void, within St. 1841, c. 124, § 3, although the debtor at the time of making it sincerely believes himself solvent. *Holbrook v. Jackson*, 136.
7. Where one citizen of this state sells goods here to another, but at the same time discloses to the purchaser the fact that the goods belong to a citizen of another state, without however disclosing the name of the owner, a subsequent discharge of the purchaser under the insolvent laws of this state, is no bar to an action by the owner for the price of the goods. *Ilsey v. Merriam*, 242.
8. A citizen of this state gave a note to the treasurer of the state of Connecticut for rent of land situate in this state, owned by that state, and leased to him by an agent of that state. It was held, in an action on the note, that the discharge of the maker, under the insolvent laws of this state, was not a bar to the action; the claim not having been proved under those laws. *Clark v. Hatch*, 455.
9. When an action pending in court is referred, by a rule of court, to arbitrators, who award costs to the defendant, but before the award is accepted by the court, the plaintiff takes the benefit of the insolvent law, and obtains his discharge, the discharge does not bar the defendant's claim for the costs awarded. *Mann v. Houghton*, 592.
10. So, when the condition of a replevin bond is broken by a failure of the plaintiff in replevin to deliver up the property on demand of the defendant after judgment for a return, a discharge in insolvency of a surety on the bond from all debts due at a time, previous to such demand, though subsequent to the commencement of the action of replevin, is no bar to an action against him on the bond. *Sleeper v. Miller*, 594, n.
11. The maker of a promissory note, who had been discharged therefrom in bankruptcy, being asked by an agent of the holder to give a new note for the debt, declined to do so, but added: "I have always said, and still say, that she shall have her pay." It was held, that a jury might properly construe these words as a distinct and unequivocal promise to pay the note. *Pratt v. Russell*, 462.

See CONTRACT, 1; CORPORATION, 2; EQUITY, 2; EVIDENCE, 7;
NEW TRIAL; PLEADING, 1.

INSOLVENT ESTATES.

A person claiming property under a gift *causa mortis* from a deceased intestate, whose estate has been represented insolvent, cannot defeat an action

of trover brought against him by the administrator to recover the value of the property, by showing that the only claim proved against the estate before the commissioners of insolvency, and which exceeded in amount the whole of the intestate's assets, including the property claimed by the defendant, was groundless, and was proved against the estate by false testimony, and that the administrator did not object to the proof of the claim, nor appeal from the allowance thereof, unless he also proves collusion between the creditor and the administrator. *Mitchell v. Pease*, 350.

See EXECUTOR AND ADMINISTRATOR, 8.

INSURANCE.

1. A mortgagee, who, at his own expense, insures his interest in the property mortgaged, against loss by fire, without particularly describing the nature of his interest, is entitled, in case of a loss by fire before payment of the mortgage debt, to recover the amount of the loss of the insurers to his own use, without first assigning his mortgage, or any part thereof, to them. *King v. State M. F. Ins. Co.* 1.
2. The by-laws of a mutual fire insurance company having provided, that any policy, issued by the company to cover property previously insured, should be void, unless the previous insurance should be expressed in the policy at the time it was issued; it was held that a policy, issued by the company, and made in terms subject to the conditions and limitations of the by-laws, in which policy a previous insurance on the property was not expressed, was void, even in the hands of an assignee without notice of the defect; although the insurers knew of the existence of such prior insurance, and of the intention of the assured that it should remain in force, and assented thereto; and although the policy was prepared by the insurers and delivered to the assured, as he supposed, pursuant to his said intention, without any knowledge on his part that the prior insurance was not mentioned therein; and although the amount insured by the policy, together with the amount of such prior insurance, did not exceed the value of the property insured. *Barrett v. Union M. F. Ins. Co.* 175.

See PLEADING, 2.

JUDGMENT.

If an attorney, inadvertently and without the knowledge of his client, takes judgment and obtains execution for a sum known by his client to be more than is really due him, and, on discovering the mistake, goes to the officer, in whose hands the execution is, to give him instructions as to the service thereof; the taking of judgment for too large a sum does not dissolve an attachment made in the action, as against subsequent attaching creditors; and if the officer refuses to receive the attorney's instructions, and applies the property to the payment of subsequent attaching creditors, the officer will be liable to the client. *Felton v. Wadsworth*, 587.

See INSOLVENT ESTATES; LANDLORD AND TENANT, 3; REPLEVIN, 2;
SET-OFF.

JURY.

See FUGITIVE SLAVES, 2; USAGE, 1; WAIVER.

JUSTICE OF THE PEACE.

See COMPLAINT.

LANDLORD AND TENANT.

1. The notice required by the Rev. Sts. c. 60, § 26, for the determination of an estate at will, when the rent reserved is payable at periods of less than three months, must not only be as long as the interval between the days of payment, but must terminate at the expiration of such an interval. *Prescott v. Elm*, 346.
2. The date of a notice to quit, given by a landlord to his tenant, cannot be presumed, in the absence of other evidence, to be one of the days on which rent was payable. *Ib.*
3. The recovery of a judgment, by the lessor against the lessee, for possession of the premises leased, puts an end to the right of one occupying a portion of the same under the lessee, by his verbal permission. *Hatstat v. Packard*, 245.

See ASSUMPSIT, 2.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LIEN.

See CORPORATION, 2; EQUITY, 1; INSOLVENT DEBTORS, 3.

MANDAMUS.

On the refusal of the treasurer or clerk of a religious society, whose term of office has expired, to deliver the records and papers of the society to his successor in office, a writ of mandamus will be issued, on the petition of the society, to compel him to do so. *St. Luke's Church v. Slack*, 226.

MANUFACTURING CORPORATION.

See CORPORATION.

MASTER AND SERVANT.

A master is responsible for the negligent acts of his servants, done within the general scope of their employment, although contrary to his express orders, if not done in wilful disregard of those orders. *Southwick v. Estes*, 385.

MASTER IN CHANCERY.

See EQUITY, 6, 7.

MINES.

See EQUITY, 3; TENANT IN COMMON, 1.

MORTGAGE.

I. *Of Real Estate.*

1. The first mortgagee of land may sell on execution, to satisfy the mortgage debt, the mortgagor's right to redeem a second mortgage of the same land. *Johnson v. Stevens*, 431.
2. Where a mortgagee of real estate made a quitclaim deed of his interest in part of the mortgaged premises, and afterwards, with the knowledge of the mortgagor, entered on the mortgaged premises for breach of condition, and for the purpose of foreclosure, a certificate of which entry, not stating on what part of the premises it was made, was indorsed on the mortgage deed, and duly recorded, and his grantee continued in possession of the part conveyed to him for three years after the entry; it was held, that the entry of the mortgagee and the possession of his grantee constituted a perfect foreclosure of the mortgage, as to that part of the premises held by the latter. *Raymond v. Raymond*, 605.
3. Where a mortgagee enters for a breach of condition by non-payment of interest, and the mortgagor brings a bill in equity to redeem, pending which the principal becomes due; the mortgagor is not entitled to a decree, but upon paying the whole sum now due, principal and interest. *Adams v. Brown*, 220.

See ASSUMPSIT, 1; EQUITY, 6, 7; EXECUTOR, &c., 3; INSURANCE, 1.

II. *Of Personal Property.*

4. Where personal property mortgaged was described as "all the staves I have in Monterey, the same I had of Moses Fargo;" and it appeared in evidence, that the mortgagor had no staves in Monterey, but had a quantity in the adjoining town of Sandisfield, near the boundary of Monterey, which he had of Moses Fargo; it was held, that the first part of the description might be rejected as false, and that the remainder was sufficient to pass the property. *Pettis v. Kellogg*, 456.
5. If a mortgage of personal property is made as security for the payment, "according to its tenor," of a promissory note, payable at a day certain, which has passed, the condition must be understood to be the payment of the note in its then existing state. *Ib.*
6. It is no sufficient objection to the validity of a demand, made by a mortgagee of personal property, upon an officer attaching the same as the property of a mortgagor, that the demand is signed by attorney; or that it states a claim of title under a pledge, as well as under the mortgage. *Ib.*

See SALE, 1.

MUTUAL FIRE INSURANCE COMPANY.

See TAX, 1.

NEW TRIAL.

1. On the trial of an action, brought by a mortgagee against the assignee in insolvency of his mortgagor, to recover the property mortgaged, in which the defendant undertakes to avoid the mortgage, as being made for the

purpose of giving an unlawful preference, the admission of the schedules of debts and other papers filed in the proceedings in insolvency, only as evidence that such proceedings were had, and not as evidence of the facts stated in the papers, is no ground for a new trial. *Holbrook v. Jackson*, 136.

2. On the trial of a cause, after one party had put in evidence certain books of account, supported by the testimony of the bookkeeper who kept them, the parties agreed to refer the books to an auditor, for the purpose of his stating the result of his examination, on the stand, to the jury, which he accordingly did. It was held, that the admission in evidence of the testimony of the auditor and his report so made, on a subsequent trial of the same cause, after the books had been rightly admitted in evidence, on other testimony than that of the bookkeeper, was no ground for a new trial, although the other party was thereby obliged to call the bookkeeper as his witness. *Ib.*
3. Particular entries, in the books of account of a mercantile firm, offered in evidence for the purpose of showing their insolvency and their knowledge of their condition at the time of making a conveyance to a preëxisting creditor, were objected to by the adverse party, solely on the ground that they were not original entries, nor proved by the clerk who made them. It was held, that the party could not, after the admission in evidence of the books, and a verdict against him, object, on a motion for a new trial, that the most important entries objected to at the trial appeared to have been made after the conveyance in question. *Ib.*

NOTICE.

See IMPOUNDING CATTLE, 1; LANDLORD AND TENANT, 1, 2; USAGE;
POOR DEBTORS, 2-5.

NUISANCE.

See EQUITY, 3.

OFFICER.

See COMPLAINT, 2; JUDGMENT; TRUSTEE PROCESS, 3.

ORDER.

See INSOLVENT DEBTORS, 2.

PARISHES AND RELIGIOUS SOCIETIES.

Twelve persons having associated themselves together, according to the forms and usages of the protestant episcopal church, for the purpose of establishing public worship, under the name of Mount Zion Church in Chelsea, and having afterwards organized themselves as a religious society, under the Rev. Sta. c. 20, §§ 26, 27, 28, 29, and, by means of subscriptions of members, and contributions from other sources, collected funds for the building of a church; subsequently, pursuant to a vote of the society, at a regular meeting called for the purpose, applied to the legislature, by a petition signed by all the members but one, who was absent from the state, for a change of name, and an act of incorporation as the proprietors of St. Luke's

Church in Chelsea: The legislature passed an act accordingly, changing the name of the society, and incorporating three of the petitioners, with their associates and successors, as a religious society, with all the powers and privileges, and subject to all the duties, restrictions and liabilities, contained in the twentieth and forty fourth chapters of the Rev. Sts., and with power to hold real and personal estate, to be applied exclusively to parochial purposes: Certain members of the society, who had subscribed towards the building of the church, having had separate meetings before the passage of the act, continued to hold them afterwards, and organized themselves separately, under the act, as the proprietors of the church: The members of the society, also, including said subscribers, accepted the act, and organized under it as a religious society; and each of the two bodies chose appropriate officers. It was held, that the act did not create a new corporation, composed of the proprietors of the church merely, but changed the name of Mount Zion Church in Chelsea, and incorporated the members thereof as a religious society, under the name of the proprietors of St. Luke's Church in Chelsea. *St. Luke's Church v. Slack* 226.

See MANDAMUS.

PARTNERSHIP.

1. Real estate, conveyed to and held by partners as tenants in common, though purchased by them with partnership funds, and for the partnership use, is to be considered at law as the several property of the individual partners, and liable to be levied on for their separate debts; but if so taken, it will be held by the creditor in trust, to be applied, so far as may be necessary, to the payment of the partnership debts. *Peck v. Fisher*, 386.
2. B. and C. were partners, under the firm of B. & C., and also copartners with A., under the firm of A. B. & C. The demandant, a partnership creditor of the firm of A. B. & C., having attached and levied on the real estate of B. & C., purchased by them with their partnership funds and for their partnership use, but held by them as tenants in common, the same was subsequently attached and levied on by the tenant, a creditor of the firm of B. & C., as their partnership property, and the demandant brought his writ of entry to recover the same; it was held, that the demandant, by his previous attachment and levy, acquired the better title at law to the demanded premises, and was entitled to judgment; but as a suit in equity was pending to subject the same to the partnership debts of B. & C., judgment was suspended to await the result of that suit. *Ib.*

See CORPORATION, 1; PROMISSORY NOTE, 5, 6.

PAYMENT.

See PROMISSORY NOTE, 2.

PAYMENT OF MONEY INTO COURT.

If the defendant, in an action of assumpsit, containing the common money counts, and also a count for the use and occupation of certain premises described, pays a part of the sum demanded into court, without specifying to

which of the counts the payment is to be applied; such payment is an admission, only that the defendant owes the plaintiff on some one or several of the counts, the sum so paid; but is not an admission of any particular contract or debt under any one of the counts, nor of a liability on all of them. *Hubbard v. Knous*, 556.

See TENDER, 1.

PLEADING.

I. *Parties to Actions.*

1. The purchaser from an assignee in insolvency, of a promissory note payable to the insolvent or his order, and not indorsed either by the insolvent or the assignee, may maintain an action thereon, in the name of the insolvent, against the maker, if the insolvent interposes no objection. *Stone v. Hubbard*, 595.
2. It seems, that an order indorsed by the assured on a policy issued by a mutual insurance company, to "pay the within in case of loss" to a mortgagee of the property insured, and assented to by the company, will enable the mortgagee, in case of loss, to maintain an action on the policy in his own name. *Barrett v. Union M. F. Ins. Co.* 175.

See EQUITY, 4; SCHOOL DISTRICT.

II. *Specification of Defence.*

See SPECIFICATION OF DEFENCE.

POOR DEBTORS.

1. An application, of a debtor committed to jail on execution, to be admitted to take the poor debtor's oath, must, since *St.* 1844, c. 154, as well as under *Rev. Sts.* c. 98, be made to the jailer, and through him to a justice of the peace. And if such debtor, who has given bond for the prison limits, is admitted to take the oath on an application made by him directly to the justice, and thereupon goes without those limits, it is a breach of the bond. *Bruce v. Keogh*, 536.
2. The certificate of two justices, in the form prescribed by the *Rev. Sts.* c. 98, § 10, upon administering the poor debtor's oath, stating that the debtor had caused the creditor, at whose suit he is confined, to be notified according to law, is not conclusive of the regularity of the notice. *Baker v. Moffat*, 259.
3. The provision of *St.* 1848, c. 286, § 1, that when a debtor "shall have given to the creditor notice of his intention to take the benefit of the law for the relief of poor debtors, no new notice of the same intention shall be given, until the expiration of seven days from the service of the former notice," applies to a case, where the first notice is defective and insufficient. *Id.* [But see *St.* 1850, c. 212.]
4. When a creditor, who has committed his debtor in execution, lives out of the commonwealth, but has two attorneys of record, partners in business, within the same, it is a sufficient service of a citation, giving the creditor notice of the debtor's intention to take the poor debtor's oath, if the officer returns that he has given "an attested copy" of the citation to such "attorneys." *Knight v. Fifield*, 263.

5. A citation, issued under *St.* 1844, c. 154, to a creditor, to attend at the examination of a debtor, arrested on a mesne process at his suit, and desirous to take the poor debtor's oath, must be served on the creditor at least twenty four hours before the time appointed for the examination, adding one hour for travel for each mile from the place of service to the place appointed for the examination; and an officer's return stating that he served the citation on the creditor on a certain day, without specifying the hour, when in fact the notice was sufficient if served before, but not if served after, a certain hour on that day, is not sufficient evidence that the citation was duly served. *Park v. Johnston*, 265.

POWER.

1. A testator having, by his will, authorized his executors to sell real estate, and appointed three persons his executors, afterwards, by a codicil, revoked the appointment of one of them by name, and appointed another person in his place and stead; it was held, that the power to sell devolved upon the two executors appointed by the will, whose appointment was not revoked, and the third appointed by the codicil. *Pratt v. Rice*, 209.
2. C. by his last will appointed T. his sole executor, and authorized him to sell and convey such of C.'s property, as in T.'s judgment would promote the interest of all concerned, to raise a certain amount for the payment of debts and of certain legacies; and devised and bequeathed the residue of his property, subject to the rights and directions given to his executor, and subject to the payment of his debts: T. declined to act as executor, and an administrator of the estate of C. with the will annexed, was appointed; T. afterwards accepted the office of trustee under the will. It was held, that T. did not, by renouncing the office of executor, lose the power to sell as trustee under the will, and that sales and conveyances so made by him, after his acceptance of the trust, were valid as against C.'s residuary devisees and their heirs. *Clark v. Tainter*, 567.

See EQUITY, 1; INSOLVENT DEBTORS, 2.

PRINCIPAL AND AGENT.

When an agent, duly authorized, sells property belonging to his principal, and gives the purchaser a receipt in his own name, without stating his agency, acknowledging the payment of part of the price, and promising to deliver the property at certain times, places and prices specified; the principal, on proving, by parol, his property, and the authority of the agent, may maintain an action in his own name for the balance of the price, subject to any equities which the purchaser may have against the agent. *Huntington v. Knox*, 371.

See CONTRACT, 2; DEED, 1; INSOLVENT DEBTORS, 7; MASTER AND SERVANT; TRESPASS.

PROCHEIN AML

The father of an infant, interested in the estate of a deceased person, having himself no adverse interest therein, may petition the judge of probate, as the next friend of the infant, for leave to sue the administration bond. *Stevens v. Cole*, 467.

PROMISSORY NOTE.

1. A debtor sent a promissory note to his creditor in payment of a debt, by the hand of a third person, who, before delivering it, at the request of the creditor, and for the purpose of giving credit to the note, put his own name on the back of it. It was held that such third person was liable as an original promisor. *Bryant v. Eastman*, 111.
2. P. made a promissory note to secure a debt from him to the payee; and W., before its delivery, put his name on the back of it: W. afterwards paid the debt, and the payee indorsed the note to him. It was held, that by the payment of the debt, the note was extinguished, and could not afterwards be put in circulation by W. as against P. *Pray v. Maine*, 258.
3. The payee of a note, who signs his name to these words written on the back thereof, "I hereby guaranty the within note," is not liable thereon as indorser. *Belcher v. Smith*, 482.
4. One who, while carrying on business on his own account, in the name of a company, which has been incorporated, but not organized, receives, in payment of a debt contracted with him in such business, a promissory note, payable to the order of the corporation, may transfer the note by indorsing it in his own name. *Bryant v. Eastman*, 111.
5. A firm, who have purchased, for a good consideration and before maturity, a promissory note, given to one of the partners for his accommodation, cannot maintain an action thereon against the maker. *Quinn v. Fuller*, 224.
6. The holder of a promissory note, being a member of a firm who are the first indorsers thereon, cannot maintain an action on the note, against a subsequent indorser. *Decree v. Burt*, 511.

See EVIDENCE, 4; GUARANTY; PLEADING, 1; SPECIFICATION OF DEFENCE, 2.

RAILROAD.

See EQUITY, 4.

RECEIPT.

See ARBITRAMENT AND AWARD, 2; PRINCIPAL AND AGENT.

RECEIPTOR.

A receiptor for property attached agreed by the terms of his receipt to redeliver it on demand to the officer, at a place named; and also that, if no demand should be made, he would, within thirty days after judgment in the action, redeliver the property, as aforesaid, that it might be taken on execution. It was held that, although no demand was made, he was liable on his receipt, if he failed to redeliver the property at the place named, within thirty days after judgment. *Hodskin v. Cox*, 471.

RECORD.

See AMENDMENT.

REPLEVIN.

1. The action of replevin, given by the Rev. Sta. c. 113, § 17, to one whose beasts are unlawfully distrained or impounded, does not exclude all other remedies at common law; trespass will still lie. *Coffin v. Field*, 355.
2. If an action of replevin is dismissed for informality in the replevin bond, and judgment given for the defendant for a return, and the plaintiff returns the property to the place from whence he first took it, he may afterwards bring another action of replevin, for the same property, against the same defendant, although the defendant has not taken out a writ of return, nor actually received the property under the judgment in the first action. *Walbridge v. Shaw*, 560.

See EQUITY, 5; INSOLVENT DEBTORS, 10.

RESERVATION.

See TENANT IN COMMON.

RETURN.

See POOR DEBTORS, 4, 5; TRUSTEE PROCESS, 4.

SALE.

1. The owner of a quantity of staves made an agreement to sell and deliver them, and that when they were all delivered, the purchaser should give good security therefor; the purchaser, after delivery of a portion of the staves, and payment of a portion of the purchase money, made a mortgage of all the staves. It was held, that the property in the staves did not vest in the purchaser, until the delivery was completed, and the security given; that the mortgage was therefore void, so far as respected the staves not then delivered; and that it was not rendered valid by the subsequent completion of the delivery and giving of security, as against attachments made still later by the creditors of the original owner. *Pettis v. Kellogg*, 456.
2. A bill of sale, containing an inventory of the articles, and adding, "said property being subject to" certain mortgages specified, is a bill of sale of all the property in the inventory, although some of the articles are not covered by the mortgages; and cannot be controlled by parol evidence, that the words, describing the property as being subject to mortgage, were added for the purpose of limiting it to the mortgaged articles. And such bill of sale, when delivered to the vendee, with notice to the person in whose hands the property is, passes the title to all the property, although the vendor, at the time of such notice, delivers the mortgaged property only to the vendee, and declares that he delivers no other. *Ridgway v. Bowman*, 268.
3. Of real estate for non-payment of taxes. See TAX, 3.

See BARK, MEASUREMENT OF; CONTRACT, 2; DAMAGES, 2; EVIDENCE, 1;
PRINCIPAL AND AGENT. TRESPASS.

SCHOOL DISTRICT.

The prudential committee man of a school district, chosen by the district, pursuant to a vote of the town, is not liable to the district for money, received by him out of the treasury of the town, which had been raised by the town, and appropriated by it to the support of the school in such district, and placed to the credit of the district upon the town treasurer's books. *School District in Belchertown v. Randall*, 478.

SELECTMEN.

See CERTIORARI; WAY, 1, 3.

SET-OFF.

In an action of debt on the judgment of a court of another state, the defendant, under the Rev. Sts. c. 96, § 11, may prove that the action is brought for the use of another person than the plaintiff, and may set off any demand which he may have against such person, which could not have been pleaded in defence of the action in which the judgment was recovered. *Sheldon v. Kendall*, 217.

SPECIFICATION OF DEFENCE.

1. The defendant, in an action to recover the price of wines and spirituous liquors sold to him by the plaintiff, may prove, under the general issue, without any specification of defence, that the plaintiff was not licensed, according to law, to sell the same. *Dixie v. Abbott*, 610.
2. So, in an action of the indorsee against the maker of a promissory note, the defendant may prove, under the general issue, without any specification of defence, that the note was indorsed to the plaintiff when it was overdue, and that it was given to the payee in payment of goods bought of him by the defendant, for the purpose, known to the payee, of being carried about from place to place and exposed to sale, contrary to the provisions of St. 1846, c. 244. *Robinson v. Howard*, 611, n.
3. A writing, signed by the plaintiff in an action of assumpsit, declaring that it was commenced without his authority or consent, and that he thereby discharges the same, is no defence to the action, when specified in defence under the general issue. *Nelson v. Thompson*, 502.

SPIRITUOUS LIQUOR.

See SPECIFICATION OF DEFENCE, 1.

SLAVES.

See FUGITIVE SLAVES.

STATUTE.

See REPLEVIN, 1; WAY, 9.

STATUTES CITED, EXPOUNDED, &c.

STATUTE OF THE UNITED STATES.

1850, c. 60.	Fugitives from Service	288, 294
--------------	------------------------------	----------

COLONY ORDINANCE.

1647.	Flats	67, 199
-------	-------------	---------

PROVINCIAL STATUTE.

1741.	Fisheries	100
-------	-----------------	-----

STATUTES OF THE COMMONWEALTH.

1836, c. 273.	Pleading	503
1837, c. 229.	Boston Harbor	83, 84
— c. 238.	Bond for Alien Passengers	116
1838, c. 163, § 1.	Insolvent Debtors	144
— — — § 3, 7.	“ “	594
— — — § 12.	“ “	342, 344
— — — § 18.	“ “	183
1840, c. 35.	Boston Harbor	84
— c. 87, §§ 4, 5.	Plea in Abatement	115
1841, c. 115.	Drain	280
— c. 124, § 3.	Unlawful Preference	146, 150, 151
1844, c. 72.	St. Luke's Church in Chelsea	226
— c. 154, § 3.	Poor Debtors	266
— — — § 10.	“ “	537
— c. 178.	Discharge of Insolvent Debtor	344
1846, c. 271, § 1.	Railroad Corporation	497
1847, c. 278.	Boston Harbor	84
1848, c. 192.	Highway	403
1848, c. 286, § 1.	Poor Debtors	261
1849, c. 222, § 5.	Bill in Equity	508, 510
1850, c. 5,	Repeal of Statute	491
— c. 314, § 4.	Trial Justice	513, 564

REVISED STATUTES.

c. 7.	Tax	274, 601, 604
c. 8, §§ 24, 25.	Sale of Real Estate for non-payment of Taxes	504, 505
c. 14, § 26.	County Commissioner	403
c. 24, § 48.	Highway	584
— — — §§ 66, 71.	Town Way	399, 401
c. 25, § 22.	Highway	491, 496
— — — § 23.	Tender	582
c. 28, § 201.	Measurement of Bark	372, 375
c. 35, § 4.	Witness to Usury	580
c. 36, § 58.	Bank	545
c. 39, § 72.	Railroad Corporation	497
c. 60, § 26.	Notice to Tenant at Will	347
c. 63, § 2.	Executor's Bond	208
c. 70, § 6.	Suit on Administrator's Bond	470

c. 71, § 20.	Devise.....	163
c. 81, § 8, cl. 4.	Bill in Equity.....	531
————, cl. 7.	Equity Jurisdiction of S. J. C.	365
c. 92, §§ 12, 13.	Joint Contractors.....	241
c. 96, § 11.	Set-off.....	218
——, §§ 25-30.	Auditor.....	148, 449, 450
c. 98, § 1.	Poor Debtors.....	537
——, § 3.	“ “.....	264
——, § 10.	“ “.....	260
c. 100, § 18.	Pleading.....	585
c. 107, §§ 18, 23.	Redemption of Mortgage.....	223, 224
c. 109, § 22.	Trustee Process.....	489
——, § 30, cl. 2, 3.	“ “.....	259
——, § 62.	“ “.....	407
c. 111, §§ 1, 2, 3.	Habeas Corpus.....	287, 292
c. 113, § 8.	Notice of Impounding of Cattle.....	358
——, § 17.	Replevin.....	358
c. 118, § 43.	Accounts.....	449

STREET.

See WAY, 6.

SURETY.

See PROMISSORY NOTE, 3.

TAX.

1. Mutual fire insurance companies are not liable to taxation for personal estate invested in their corporate names and held by them for the purposes of their incorporation. *Worcester M. F. Ins. Co. v. Worcester*, 600.
2. Where a person, who is liable to be taxed in a city or town for any real estate, is overtaxed by the assessors, whether the excess is caused by too high a valuation of real estate for which he is liable to be assessed, or by including in the valuation estates for which he is not liable, his only remedy is by application to the assessors for an abatement. *Howe v. Boston*, 273.
3. Where the advertisement and notice of sale of real estate, for non-payment of a tax of three dollars and thirty cents, state the amount of the tax to be four dollars and twelve cents, the sale is void. *Alexander v. Pitts*, 503.

See ASSUMPSIT, 5.

TENANT AT WILL.

See LANDLORD AND TENANT.

TENANT IN COMMON.

1. In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void. *Adam v. Briggs Iron Co.* 361.
2. A release to a tenant in common from his co-tenants, of their interest in a specific part of the land held in common, confirms a conveyance previously made by him of that part of the land. *Johnson v. Stevens*, 431.

See EQUITY, 3; PARTNERSHIP; WAY, 10.

TENDER.

1. A tender, under Rev. Sta. c. 25, § 23, of a certain sum in full of damages sustained in consequence of a defect in a highway, has the effect and operation of a tender at common law; and where the declaration contains only one cause of action, specifically set forth, the tender is a conclusive admission of every fact, which the plaintiff would otherwise be bound to prove, in order to maintain his action, and precludes the defendant from introducing evidence of carelessness on the part of the plaintiff, either as to the merits of the case, or in mitigation of damages. *Bacon v. Charlton*, 581.
2. Where a party designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object, that no tender was made. *Southworth v. Smith*, 391.
3. If A., the purchaser of real estate at a sale on execution, when B., a purchaser of the debtor's right to redeem, attempts to make him a tender of the money due, is absent from home by necessity or other cause, and without any intention to evade a tender, and in consequence of such absence, and by the use of due diligence, B. is unable to find A., or any person authorized to act in his behalf, and is thereby prevented from making the tender seasonably, no forfeiture of the estate is thereby incurred; and, in such case, it is not necessary that there should be a precise and accurate count of the money, provided B. was prepared to make the tender; or that B. should offer the money to any one, or leave it where A. could control it; or that A. should know that B. had the right to redeem from the sheriff's sale, provided B., when he goes to make the tender, produces his deed, and declares that he stands in the place of the debtor. *Id.*

See PAYMENT OF MONEY INTO COURT.

TOWN.

See SCHOOL DISTRICT; WAY, 6-9.

TRADE MARKS.

See ACTION.

TRESPASS.

Where a son, at the suggestion and by the agency of his father, who was insolvent, purchased and gave his notes for a lot of land with timber growing thereon; and, by an agreement between the father and son, the father was to cut off and sell the timber, and to pay for the labor and other charges, out of the proceeds, and appropriate the balance towards payment of the notes given for the purchase money, and to pay any remaining surplus to the son; it was held, that trees cut and lumber sawed under this agreement were the property of the son, who might maintain trespass against an officer for attaching the same as the property of the father, and recover damages to the full value of the property at the time of the trespass. *Mitchell v. Setson*, 435.

See COMPLAINT, 2; EVIDENCE, 11; IMPOUNDING CATTLE, 2;
REPLEVIN, 1; WAY, 11.

TRIAL JUSTICE.

See COMPLAINT.

TRUST.

See EQUITY, 1; PARTNERSHIP.

TRUSTEE.

See POWER, 2.

TRUSTEE PROCESS.

1. An executor is not liable by the trustee process, as the trustee of the heir of a deceased legatee, for the amount of a legacy in his hands, which was due to the legatee at the time of his decease. *Stills v. Harmon*, 406.
2. Where a small locked trunk is deposited in the vault of a bank, for safe keeping merely, with the consent of the officers of the bank, who are ignorant of its contents, and have no authority to open the trunk for the purpose of ascertaining them; neither the bank nor its officers, can be charged by the trustee process as the trustees of the owner, either for the contents of the trunk, or for the trunk itself. *Bottom v. Clarke*, 487.
3. An officer is not liable, by the trustee process, to a creditor of a person arrested by him on a criminal warrant, for money or other property, taken by the officer under color of his official duty from the person of his prisoner, and for which he gives the latter a receipt. *Robinson v. Howard*, 257.
4. An officer's return on a trustee process, that he has served the same on a certain agent of the alleged trustee, is conclusive evidence that the service was made on such agent. *Woodworth v. Ranzehousen*, 430.

USAGE.

1. A usage at an inn, for the guests to leave their money or valuables at the bar, or with the keeper of the house or his clerk, is not binding upon a guest, unless he has actual knowledge or notice of it; and whether he has such knowledge or notice is a question of fact for the jury. *Berkshire Woollen Co. v. Proctor*, 417.
2. In an action brought against an innkeeper by his guest, for a loss of money stolen from the apartment of a guest, evidence of the custom of other individual innkeepers and their guests, in regard to depositing the money of the latter in safes kept for the purpose, is inadmissible. *Ib.*

USE AND OCCUPATION.

See ASSUMPSIT, 2.

USURY.

See WITNESS, 1.

WAIVER.

If a special contract, whereby one party agrees to make certain machines for the other, who agrees, on his part, to furnish materials therefor from time to time, is broken by a neglect to furnish the materials, and the first party, notwithstanding, proceeds for some time with the work; the question, whether he thereby waives the breach, so as to preclude himself from recover-

ing damages therefor, is a question of fact, to be determined by the jury upon all the evidence in the case. *Fox v. Harding*, 516.

See IMPOUNDING CATTLE, 2.

WARRANTY.

See DAMAGES, 2.

WAY.

1. The authority conferred upon selectmen by the Rev. Sts. c. 24, § 66, to lay out town ways for the use of their respective towns, is limited to roads having their *termini* within the town; but it is no objection to such laying out, that the road is intended as one link in a chain of continuous roads; that it is for the convenience of the inhabitants only from its connection with some great thoroughfare; and that, when established, it will be for the use of the public generally, as well as of the inhabitants of the town in which it is situated; and if selectmen unreasonably neglect or refuse to lay out such way, the county commissioners may lay out the same, under the appellate jurisdiction conferred upon them by the Rev. Sts. c. 24, § 71. *Monterey v. Berkshire*, 394.
2. Whether a town way, for the laying out of which application is made to the county commissioners, on the refusal of the selectmen to lay it out, is for the use of the town within which it is situated, is a question exclusively within the discretion of the commissioners to decide. *Ib.*
3. A petition to the selectmen of M., to lay out a way, having described the same as commencing at a point in the town of M., and extending "to the line of N.," and the county commissioners, upon the refusal of the selectmen, having laid out the same, describing it as beginning at a certain point within the town of M., and "terminating at a stake in the line dividing M. from N.;" it was held, that there was nothing, either in the petition or the location to show that the road was not within the jurisdiction of the selectmen to lay out. *Ib.*
4. Where an order of county commissioners, passed in January, 1849, directed a town to make a certain road, by the first of October then next, and also not to commence the work until the time (one year) for applying for a jury to change the location had passed; and the commissioners, in May, 1850, (the road not having been made,) passed an order for the making and completion thereof, by the first of September then next; it was held, that, whether the first order was nugatory and void or not, the second order was valid; and that it was no objection to the last order, that the first was erroneously cited therein, as having been passed in January, 1848, instead of January, 1849, the error being merely clerical, and it being apparent that the petitioners were not misled thereby. *Ib.*
5. The provisions of St. 1848, c. 192, requiring county commissioners and the authorities of cities and towns to cause stone bounds or other monuments to be erected at the *termini* and angles of all roads laid out by them, are merely directory, and not necessary to be complied with, in order to a valid location; they more properly relate to acts to be done after the way is

located; and compliance therewith need not be stated on the record of the laying out of the road. *Ib.*

6. The discontinuance of part of a street in a city, by order of the mayor and aldermen, whereby the value of lands abutting on other parts of the street, and on the neighboring streets, is lessened, is not a ground of action against the city by the owner of such lands, if still accessible by other public streets. *Smith v. Boston*, 254.
7. A town is not liable for an injury occasioned to a traveller, passing from a public highway to a railroad station through a road opened by the proprietors of the railroad for that purpose, by a block of stone, lying within the limits of the highway, as located, and obstructing the entrance to the road to the station, if it does not obstruct the road-bed of the highway. *Smith v. Wendell*, 498.
8. A town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair. *Sawyer v. Northfield*, 490.
9. The statute of 1850, c. 5, providing that "if any person has heretofore received or suffered, or shall hereafter receive or suffer, any bodily injury," &c., through any defect or want of repair in a highway or bridge, "he may recover in a special action of the case of the county, town or persons, who are by law obliged to repair the same, the amount of damages sustained thereby," if they had reasonable notice, or if the defect had existed twenty four hours; and repealing Rev. Sts. c. 25, § 22, saving actions in which verdicts had been rendered when the statute of 1850 took effect; did not prevent the recovery of single damages against a town for an injury occasioned by such a defect or want of repair, in an action upon Rev. Sts. c. 25, § 22, which had been commenced, but in which no verdict had been rendered, when the statute of 1850 took effect. *Ib.*
10. Under Rev. Sts. c. 24, § 48, one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages, without the joinder of his co-tenants. *Dwight v. Hampden*, 538.
11. A traveller on a highway, rendered impassable by a sudden and recent obstruction, may pass over the adjoining fields, so far as is necessary to avoid the obstruction, doing no unnecessary damage, without being guilty of a trespass. *Campbell v. Race*, 408.

See CERTIORARI; COUNTY COMMISSIONERS; EQUITY, 3, 4; EVIDENCE, 5; TENDER, 1.

WHARF.

See CONSTITUTIONAL LAW; FLATS.

WILL.

1. A will, which was made and took effect before the passage of St. 1791, c. 60, § 8, contained the following provisions: "I give to my daughter S. the use and improvement of" certain real estate, "during her natural life, and at her death I give the same to her children lawfully begotten." "I also

give her, during her life," certain other estate. "But all the foregoing grants and bequests are given her only during her natural life, and then to descend to her child or children lawfully begotten, their heirs and assigns, forever; but if she should leave no child, then to be equally divided among my grandchildren; it being my intention to entail as far as my grandchildren." S. had two children, both of whom were living at the death of the testator. It was held, that the will gave S. an estate for life, remainder to her children in fee. *Wight v. Baurry*, 105.

2. A devise to an heir at law of exactly the same estate in land as he would take by descent without the devise is void, and the heir takes the land by descent. *Ellis v. Page*, 161.
3. A testator devised land to certain trustees, "in trust to pay over the net rents and income thereof to his son, C., during his life, and on his decease, to convey in fee, and pay to his children, said houses and lots, or the proceeds thereof, in case they have been sold, and in default of such children, to convey and pay the same to his heirs at law;" and authorized the trustees to sell, at their discretion, any of the land so devised to them; but no sale was ever made by them under this power, and C. died without issue. The personal estate of the testator was insufficient to pay debts and legacies. It was held, that the devise to the heirs at law of C. was not a specific devise, but that the land so devised was liable to be sold for the payment of debts and legacies, under the Rev. Sts. c. 71, § 20. *Ib.*
4. A devise of an undivided part of a testator's real estate must yield to a subsequent clause in the will, authorizing the executors, at their discretion, to sell and convey a part or the whole of the real estate of the testator. *Pratt v. Rice*, 209.

See POWER.

WITNESS.

1. In an action on a promissory note payable to an executor, the defendant is not a competent witness, under Rev. Sts. c. 35, § 4, to prove that the consideration of the note was usurious interest taken and reserved of him by the payee's testator; although the payee was cognizant, of his own knowledge, of the nature of the usurious transaction, at the time it took place. *Bacon v. Robinson*, 579.
2. Since the Rev. Sts. c. 92, §§ 12, 13, one of several joint contractors, who, by reason of his absence from the commonwealth, is not served with process, in an action brought against them on the contract, cannot be rendered a competent witness for the others, by a release from them of his liability to contribute towards the payment of the debt, in case the plaintiff should recover against them, and they should be obliged to pay it. *Jennings v. Fisher*, 239.
3. The testimony of one of the subscribing witnesses to a deed is sufficient to prove its execution; unless the judge, in his discretion, requires the production of the others. *Burke v. Miller*, 547.
4. When a witness is called to prove the signature of a deed, it is within the discretion of the presiding judge to allow the adverse party, who has not

yet opened his case, to cross-examine the witness immediately on the whole case, or to require him to wait and recall the witness, after having opened his case. *Ib.*

See ARBITRAMENT AND AWARD, 1; EVIDENCE, 10.

WRIT OF ENTRY.

A testator devised land, subject to a right which he gave to a trustee to sell and convey any of the same at his discretion for the payment of certain legacies and debts: The devisee brought a writ of entry to recover the land against one having no title. It was held, that a sale and conveyance, duly made by the trustee to the tenant, pending this action, was no bar to the demandant's recovery. *Tainter v. Hemenway*, 573.

See EVIDENCE, 11.



UNIVERSITY LIBRARY

